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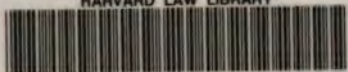
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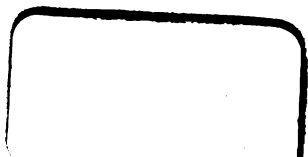
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**REPORTS**  
**OF**  
**CASES ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF OHIO**

**REPORTED BY**  
**EMILIUS O. RANDALL**  
**SUPREME COURT REPORTER**

**NEW SERIES**  
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DEC 27 1915

# JUDGES OF THE SUPREME COURT OF OHIO

For the time commencing September 22, 1913, and ending  
January 1, 1915.

HON. HUGH L. NICHOLS, CHIEF JUSTICE.	
HON. JOHN A. SHAUCK,	} JUDGES.
HON. JAMES G. JOHNSON,	
HON. MAURICE H. DONAHUE,	
HON. R. M. WANAMAKER,	
HON. OSCAR W. NEWMAN,	
HON. J. FOSTER WILKIN,*	

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For the time commencing January 1, 1915, and ending  
March 9, 1915, the date of closing this volume.

HON. HUGH L. NICHOLS, CHIEF JUSTICE.	
HON. JAMES G. JOHNSON,	} JUDGES.
HON. MAURICE H. DONAHUE,	
HON. R. M. WANAMAKER,	
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HON. THOMAS A. JONES,	
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\* Deceased December 4, 1914.

† Assumed office January 11, 1915.



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# MEMORIAL

ON LIFE, CHARACTER AND PUBLIC SERVICES

OF

J. FOSTER WILKIN

*To the Chief Justice and Judges of the Supreme Court of Ohio:*

In performance of the sad duty to which we were assigned by the court, we submit the following:

J. Foster Wilkin died December 4, 1914, after a brief illness, while he was one of the judges of this court. The funeral services were held at the Presbyterian church, New Philadelphia, December 7. The presence and participation of all his associates in this tribunal and the large attendance of citizens attested the high place he held in the general esteem and the widespread grief awakened by his sudden and untimely death. And at the same time his memory was highly honored by special proceedings of the lawyers of Tuscarawas county, who knew him by the searching tests of long comradeship at the bar.

J. Foster Wilkin was born at Holiday's Cove, in what is now the state of West Virginia, February 26, 1853. His parents were Andrew J. and Maxima Wilkin. They afterwards removed to

Newcomerstown, Ohio, where the son became a pupil of the Rev. U. Jesse Knisely, a gifted and distinguished educator, with whom he made rapid progress in his studies. After passing through the schools of the village, he received a collegiate education at Washington and Jefferson College and at Wooster University. The foundation of his legal education was laid at the University of Virginia.

Mr. Wilkin began the practice of law at New Philadelphia, Ohio, and soon became prominent in his profession. His success as a young lawyer led to his election and reelection to the office of prosecuting attorney, which he filled with credit and to the satisfaction of the people.

In June, 1876, he was united in marriage with Miss Virginia Smith, a daughter of the Hon. G. B. Smith, of Newcomerstown. She had been his playmate in childhood. Their early and loyal affection was merely confirmed at the altar. Six boys and two girls were born to them, all of whom survive. Three of the sons are now following their father's footsteps in the profession of law and their success was his joy and pride.

The married life of Judge Wilkin was happy and beautiful. Husband and wife shared faithfully the labors and responsibilities of rearing a large family and brought unflinching fortitude and mutual support to all the duties of life.

Judge Wilkin's mother was a pious woman and had early trained him in the ways of righteousness. As he grew up these impressions deepened; he early became a devoted member of the Presbyterian church; and at the time of his death was, and had been for thirty years, one of its ruling elders.

Judge Wilkin practiced his profession for more than a third of a century in Tuscarawas county, and won an honorable rank in it. His mind had a keen and vigorous grasp, with breadth and largeness of view. He was not so much a student of cases as of principles. The law, to him, was a science to be practically applied for the promotion of right. His mind had a logical cast. He was a lover of justice, and could not consent to any interpretation of the law which, in its practical operation, did not reach just conclusions. He liked to trace the law back to its sources and had been a diligent student of Roman jurisprudence. But the law did not wholly monopolize his attention; he was a student in several departments of knowledge; he was a lover of good literature, and was never alone among good books. They were an incentive and an inspiration to him.

In later years he acquired the German language and was fond of communing with the master spirits of its rich and varied literature.

Judge Wilkin was by nature and instinct a gentleman. In his intercourse with others he was uniformly kind, courteous and considerate. He was a loving and devoted husband, and a wise, though indulgent, father. He succeeded in impressing on his children the value of education and usefulness in life.

He was also a lover of nature in all her forms and aspects. Nothing delighted him more, during the heated seasons of the year, than to get out into a cabin or tent in the forest or by the stream and spend his time in study or contemplation; this was not solitude to him;

"'Twas but to hold  
Converse with nature's charms,  
And view her stores unrolled."

The early life of Judge Wilkin was a struggle. With a growing family and no patrimony he pushed his way to success and eminence. He probably attained the height of his ambition in becoming a judge of the highest court of his state. His life is a tribute to the fruitfulness of our institutions and an inspiration to the young in showing how a man struggling with adversity can, by energy, industry and perseverance, directed by an upright character, overcome all obstacles.

Judge Wilkin was a man of pleasing presence and manners, and apparently of sound and vigorous physique. His sudden call to rest in the midst of his useful labors is one of the mysteries which we cannot fathom. But it is a comfort to his family and friends that the years of his life, cut short though they were, served to make for him and them and for his community and the state a career of varied usefulness. And who can say that it is not one of God's mercies to pass in the midst of one's activities, when the life, though already rich in accomplishment, seems to human eyes still uncompleted; to be spared the risk of consciousness, or the still worse, unconsciousness, of failing powers; to live in the memory of all as an erect and vigorous figure, unmarred by disease, unwithered by age?

The results of his brief service on the supreme bench were pleasing to his friends. He fitted easily and naturally into the place, exhibiting at once a mental grasp and knowledge of the law, with facility in applying it, worthy of a judge of long experience. His opinions, necessarily few on account

of his limited term of service, appear in volumes 87, 88, 89 and 90 Ohio State Reports, and are clear and vigorous expositions of the law with which they deal.

Respectfully submitted,

JUDSON HARMON,  
DAVID K. WATSON,  
J. H. MITCHELL,  
REED CARPENTER,  
RALPH WESTFALL,  
J. W. YEAGLEY,

*Committee appointed by the Supreme Court.*





**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF OHIO**  
**JANUARY TERM, 1914.**

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HON. HUGH L. NICHOLS, CHIEF JUSTICE.

HON. JOHN A. SHAUCK, HON. JAMES G. JOHNSON, HON. MAURICE H. DONAHUE, HON. R. M. WANAMAKER, HON. OSCAR W. NEWMAN, HON. J. FOSTER WILKIN,	}	JUDGES.
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**THE STATE, EX REL. POGUE, PROSECUTING ATTOR-  
NEY, ETC., v. GROOM, ACTING CITY  
SOLICITOR, ETC.**

*Office and officer—Budget commissions—Membership—Section 5649-3b, General Code—As amended 103 O. L., 552, and 104 O. L., 237—Unconstitutional and void—Repealing clause invalid, when—County duties to be performed by county officers, when—Constitutional law.*

1. The act of the general assembly passed February 16, 1914 (104 O. L., 237), amending Section 5649-3b, General Code, as amended April 16, 1913 (103 O. L., 552), in so far as it purports to designate who shall constitute the county budget commission, is unconstitutional and void.

## Statement of the Case.

2. The act of the general assembly passed April 16, 1913 (103 O. L., 552), purporting to amend Section 5649-3b, General Code, by designating who shall constitute the county budget commission, is to that extent unconstitutional and void, and the repealing clause of the act, in so far as it repeals that portion of Section 5649-3b, is invalid.
3. Where an act of the general assembly, purporting to provide a substitute for an existing law and in terms repealing the existing law, is declared to be unconstitutional and void, the repealing clause must also be held invalid, unless it clearly appear that the general assembly would have passed the repealing clause regardless of whether it had provided a valid substitute for the act repealed.
4. The general assembly has the authority to create new duties and require such duties to be performed by the incumbents of an existing office, but where the duties so created are in their nature and extent county official duties, they must be attached to a county office and must be required to be performed by a county officer duly elected by the electors of the county, or lawfully appointed to fill a vacancy in that office.

(No. 14722—Decided September 15, 1914.)

## IN QUO WARRANTO.

This action was brought by the state of Ohio upon relation of Thomas L. Pogue, prosecuting attorney of Hamilton county, Ohio, against Charles A. Groom, who, on account of the disability of Walter M. Schoenle, the duly elected and qualified city solicitor of the city of Cincinnati, Ohio, was then acting city solicitor of that city and performing and claiming the right to perform the duties of a member of the budget commission of Hamilton county, Ohio. Later, the disability of the city solicitor having been removed, he returned to the discharge of his duties as such solicitor, and the original defendant retired as a member of the

## Statement of the Case.

budget commission and the solicitor took the place upon that commission vacated by him.

A supplemental petition was filed, averring these facts and making Walter M. Schoenle, city solicitor of the city of Cincinnati, a defendant to this action, averring that relator, as prosecuting attorney of Hamilton county, is entitled to sit as a member of the budget commission of Hamilton county, Ohio, and perform and discharge the duties as such member, but that the defendant has unlawfully intruded himself as a member of that commission to the exclusion of relator, and praying for a writ of ouster against Walter M. Schoenle and for an order of this court inducting the relator as a member of the budget commission of Hamilton county, Ohio. To this supplemental petition the defendant, Walter M. Schoenle, filed an answer, averring that he is the duly elected and qualified solicitor of the city of Cincinnati; that the city of Cincinnati is the largest municipality in Hamilton county, as shown by the last federal census, and that the amount of taxable property in that city alone and also in all the cities and villages in that county, exceeds the amount of taxable property of the territory outside of the cities and villages in the county, as shown by the tax duplicate of the preceding year and by the tax lists of the current year as fixed by the district assessors and equalized by the tax commission of Ohio, and claims by virtue of the act of the general assembly of Ohio, passed April 16, 1913 (103 O. L., 552), as amended by an act passed February 16, 1914 (104 O. L., 237), that it is his right and duty to sit

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and act as a member of the budget commission of Hamilton county, Ohio, and that his acts as such are in all respects valid. To this answer the relator filed a general demurrer, and the cause is submitted to this court upon this demurrer of the relator to the answer of Walter M. Schoenle.

*Mr. Thomas L. Pogue*, prosecuting attorney, and *Mr. John V. Campbell* and *Mr. Carl M. Jacobs, Jr.*, assistant prosecuting attorneys, for relator.

*Mr. Walter M. Schoenle*, city solicitor, and *Mr. Charles A. Groom* and *Mr. Constant Southworth*, assistant city solicitors, for defendant.

*Mr. Timothy S. Hogan*, attorney general; *Mr. Clarence D. Laylin*; *Mr. Frank Davis, Jr.*, and *Mr. James I. Boulger*, *amici curiae*.

DONAHUE, J. This cause is submitted to this court on the demurrer of the relator to the answer of the defendant. No demurrer was filed to the petition, but it is now insisted on the part of the defendant that this demurrer to the answer should be sustained for the reason that a member of the county budget commission is not a public officer, and that, therefore, an action in *quo warranto* will not lie to oust him as a member of that commission. If Section 5649-3b, General Code, in its original form or as amended, does in fact create a new office, then it is in clear violation of the positive provisions of the constitution, in so far as it purports to appoint the incumbents of that office. Section 27 of Article II of the Constitution provides

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that "No appointing power shall be exercised by the general assembly, except as prescribed in this constitution, and in the election of United States senators; and in these cases the vote shall be taken *viva voce*." It is apparent, however, from the language used in Section 5649-3b, General Code, either in its original form or as amended, that this section does not create or purport to create any new office, but rather imposes additional duties upon the incumbent of existing offices. These duties, however, are official duties in every sense of the word, and if they are by statute attached to the office of prosecuting attorney and the defendant is claiming the right and the authority to discharge these duties and is proceeding to act in that behalf to the exclusion of the prosecuting attorney, he is to that extent usurping the office of prosecuting attorney of the county, and an action in *quo warranto* will lie to inquire by what authority he claims to exercise the rights and authority of the prosecuting attorney to discharge any or all the duties belonging to that office.

It is true the petition avers that the defendant is usurping the office of member of the budget commission of Hamilton county, Ohio, but it further appears from the petition that he is claiming the right to sit as a member of the budget commission of that county to the exclusion of the prosecuting attorney of the county and to discharge and perform the duties and exercise the authority of the prosecuting attorney in that behalf. It follows that if this defendant is in fact wrongfully and unlawfully intruding himself as a member of the

## Opinion of the Court.

county budget commission; if he is wrongfully and unlawfully claiming the right and the authority to discharge these duties and is wrongfully and unlawfully discharging and pretending to discharge the same, he is in fact intruding himself into the office and usurping the powers and authority of the lawful incumbent of that particular office to which these duties attach, regardless of the averments of the petition as to the office he is usurping.

The important question in this case, however, is whether these duties attach by law to the office of prosecuting attorney or to the office of city solicitor of the city of Cincinnati in the county of Hamilton, and this involves the question of the constitutionality of the act of February 16, 1914, entitled "An act to amend Section 5649-3*b*, of the General Code, as amended April 16, 1913, providing for the time of meeting of the county budget commissions." It is clear from the facts averred in the answer, and admitted by the demurrer for the purposes of the demurrer, that if this act is constitutional the defendant is entitled to sit as a member of the county budget commission of Hamilton county. If this act is unconstitutional, then, for the same reasons, the act of April 16, 1913, in so far as it purports to amend Section 5649-3*b*, General Code, is also unconstitutional, and it will be unnecessary in this opinion to refer further to that act, except the repealing clause, which in terms purports to repeal Section 5649-3*b*, General Code.

The county budget commission is a uniform commission, with uniform duties and authority in each of the counties of the state, yet this amend-

## Opinion of the Court.

ment does not provide that the several county budget commissions shall be uniformly constituted. On the contrary, in some counties the mayor of the largest municipality within the county, the city solicitor of the same municipality and the county auditor constitute the county budget commission. In other counties, the mayor of the largest municipality within the county, the county auditor and the president of the board of education of the school district containing the largest municipality within the county constitute this commission. This amendment further provides that when the president of that board of education is not an elector, then that board of education shall designate one of its members who is an elector to serve as a member of the county budget commission. No provision whatever is made for the selection of a third member of this commission where no member of the board of education of the school district containing the largest municipality of the county is an elector.

It appears, therefore, that under the provisions of this amendment this uniform county budget commission, possessing uniform authority in each of the several counties of the state, may not only be constituted in three different ways, but in some instances this third member may be designated by persons who are not electors of the state, and under some circumstances no third member of this commission can be chosen at all.

It may be claimed that the general assembly has the right to make this classification of counties upon the basis of urban and city population, but such a classification with reference to a board or



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commission charged with the performance of uniform duties and clothed with uniform authority in each of the several counties of the state, regardless of the proportion of city and urban population, would be a mere arbitrary classification that cannot be permitted under our constitution.

Even if such a classification were proper, it is conceded that the duties of this commission are official duties. Therefore, they must be performed by an officer legally elected or appointed to the office to which these duties attach. It is hardly necessary to say that the designation of a person to sit as a member of this commission by persons not electors of this state would not be a legal appointment, even if under our constitution the office to which these duties attach were an appointive one.

It is also possible under the laws of this state that no member of the board of education of the school district containing the largest municipality of the county would be an elector. In such event this amendment provides no possible way for the selection of a third member of the budget commission, and for this reason also this law would not have uniform operation throughout the state. It is true that such a contingency is not probable, but in testing the constitutionality of the law we are dealing not with the probabilities but the possibilities that may arise in the course of its operation, and we cannot overlook the provisions of other statutes of our state under which conditions might lawfully arise that would prevent the uniform operation of the law in question.

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It is contended further on the part of the relator that Section 5649-3*b*, as amended April 16, 1913 (103 O. L., 552), and as amended February 16, 1914 (104 O. L., 237), imposes governmental functions necessarily exercised throughout the county, and that the duties created by this section and the amendments thereto cannot be attached to an office the incumbent of which is not elected by a constitutional majority of all the electors of the county. In other words, that the official duties required by these sections are official duties for the whole county and each part and parcel of the county, and therefore must be performed by a county officer.

Undoubtedly the duties of the county budget commission are an inherent part of the sovereign power of taxation. This power can be exercised only by a government through officers duly authorized to perform this important function of government. The character of a public office is determined by the nature of the public service to be performed in connection with the territorial limits of the authority to act in an official capacity. The service performed by this commission is performed for the whole county and each part thereof, regardless of the lesser political subdivisions. This amendment very properly designates it as "the budget commission of each county." It is clear, therefore, that whoever is lawfully authorized to perform this public service for the county at large is a county officer, not necessarily a separate and distinct officer from the other county officers, for the legislature may create new official duties at will and require the incumbents of existing offices to

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perform these duties, but the new duties created by law must by law be performed by an officer having constitutional authority to perform the same.

Section 1 of Article X of the Constitution of Ohio reads as follows: "The general assembly shall provide, by law, for the election of such county and township officers as may be necessary."

It is clear from this provision of the constitution that the legislature of this state cannot create a county office without providing by law for the election of the officer who is to discharge the duties of that office. That being clear, upon what theory then can the general assembly of this state create official duties to be performed for the whole county and attach the same to offices the incumbents of which are not elected by the electors of the county for which these services are to be performed? Section 1 of Article X of the Constitution gives to the electors of a county the right to say who shall administer its local affairs, and any attempt by the legislature to clothe an individual not elected by a constitutional majority of the electors of the county with such authority would be a clear invasion of this constitutional right. Neither the mayor nor the city solicitor of the largest municipality in the county, nor the president of the board of education of the school district containing the largest municipality within the county, nor a member of that board of education designated by the board of education itself, is elected by the electors of a county, yet if either of these officials should serve as a member of the county budget commission he would be required to serve the entire county in an official

## Opinion of the Court.

capacity, and his authority to perform the duties of this position would extend throughout the entire territorial limits of the county. Therefore the act of February 16, 1914 (104 O. L., 237), purporting to amend Section 5649-3*b*, as amended April 16, 1913, and the act of April 16, 1913 (103 O. L., 552), purporting to amend Section 5649-3*b*, are each in direct conflict with Section 1 of Article X of the Constitution of Ohio and void in so far as either of said acts purports to confer authority to perform official acts for the county upon officers not elected by the electors of the whole county.

Section 2 of the act of April 16, 1913, specifically repeals Section 5649-3*b*, General Code. It is clear, however, that the general assembly did not intend to abolish county budget commissions, and therefore the presumption obtains that it would not have passed this repealing clause had it not believed it was providing a valid substitute for the section repealed. All the legislation upon this subject would become meaningless and impossible of operation without a budget commission or some other board or officer clothed with authority to review and revise the various levies of a taxing district so as to bring such levies within the limit provided in other sections of the original act. All the other sections of the original act are retained, and this amendment clearly evidences the intention of the legislature to continue the county budget commission for the purposes and with the authority stated in the original act. It is the unquestioned law of this state that where an act repealing another act and purporting to provide a substitute

## Opinion of the Court.

therefor is found to be unconstitutional and invalid, the repealing clause must also be held to be invalid, unless it shall appear that the legislature would have passed the repealing clause even if it had provided no valid substitute for the act repealed. The act of April 16, 1913 (103 O. L., 552), purporting to amend Section 5649-3b, being unconstitutional in the particulars hereinbefore mentioned, the repealing clause of that section must also be held to be invalid in so far as it repeals any part of the original act for which a valid substitute is not provided, and to that extent Section 5649-3b, General Code, is still in full force and effect.

It is true that this section is subject to the same objection urged against these amendments, yet it is expressly provided that a quorum of the budget commission is authorized to transact business, and at least two of the members designated by the original act to serve as members of the county budget commission are county officers elected by a constitutional majority of the electors of the county.

The demurrer to the answer of the defendant is sustained, and the defendant not desiring to plead further, judgment is entered for the relator.

*Judgment of ouster.*

NICHOLS, C. J., SHAUCK, JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

Statement of the Case.

THE STATE, EX REL. DURR, AUDITOR, ETC., *v.*  
SPIEGEL ET AL., BUDGET COMMISSIONERS.

*Statutory construction—Amendatory acts construed, how—Amended sections considered with entire subject, when—Limitation of tax rate—Act of April 16, 1913 (103 O. L., 552)—Amends Section 5649-2, General Code, how—Interest and sinking fund included, when.*

1. Where an amendatory act contains the entire section or sections as amended and repeals the original section or sections in compliance with Section 16, Article II of the Constitution, the amended sections are to be given the meaning they would have had if they had read from the beginning as they do as amended, except where such construction would be inconsistent with the manifest intent of the legislature.
2. An act amending one or more sections of a statute should be considered in connection with the whole statute of which it has become a part, the object intended to be accomplished by the law, the imperfections to be removed and the changes to be made by the amendment.
3. The only change made in the original Section 5649-2, General Code, by the amendment of April 16, 1913 (103 O. L., 552), is the elimination of the part of the original section that is not included in the amendment. The words "heretofore" and "hereafter," found in both, refer to the date of the passage of the original act June 2, 1911.

(No. 14723—Decided September 17, 1914.)

IN MANDAMUS.

The petition of the relator, after setting out the official positions of the parties, alleges that by virtue of Sections 5649-1 to 5649-5*b*, General Code, it is the duty of the budget commission to adjust and determine the amount of the levy to be made for the ensuing year for the city of Cincinnati, including that for the sinking-fund trustees to provide

## Statement of the Case.

for a sinking fund and interest on outstanding bonds of the city; that the total amount of the levy required for all sinking-fund purposes is \$1,623,736, and of this \$196,074.47 is required to provide for the sinking fund and interest for bonds of the city issued between June 2, 1911, and August 8, 1913, under Section 3939 *et seq.*, General Code, without a vote of the people; that said requirements have been duly certified by the city to the defendants as such commission; that on August 27, 1914, relator requested of defendants that in providing for the levy they include the sum of \$196,074.47 within the ten-mill limit provided in Section 5649-2, General Code, as amended April 16, 1913 (103 O. L., 552), but that the defendants refused to include said amount within the ten-mill limit as provided by law, but voted to levy the sum of \$196,074.47 in addition to the said ten mills, contrary to the provisions of said Section 5649-2. The petition prayed for a writ of mandamus commanding the defendants to make the levy for the sum named within the ten-mill limit.

After admitting the official character and the duties of the parties as stated, the answer admitted that the sum of \$196,074.47 is required to provide for the sinking fund and interest for bonds of the city of Cincinnati issued between June 2, 1911, and August 8, 1913, under Section 3939 *et seq.*, General Code, and without vote of the people.

The answer further admits the making of the request by the relator as alleged and the refusal to comply therewith. It avers that the relator ought not to have the writ because, under Section 5649-2,

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General Code (103 O. L., 552), which became effective as a law of the state on the 8th of August, 1913, levies for interest and sinking-fund purposes necessary to provide for indebtedness incurred without a vote of the people before the said 8th of August, 1913, are required to be levied in addition to the aggregate amount of ten mills authorized to be levied therein.

The relator demurs to the answer, and the case is presented here on the demurrer.

*Mr. Thomas L. Pogue*, prosecuting attorney; *Mr. John V. Campbell* and *Mr. Carl M. Jacobs, Jr.*, for relator.

*Mr. Walter M. Schoenle*, city solicitor, and *Mr. Constant Southworth*, for defendants.

JOHNSON, J. The difference of opinion between the parties, as to the duty of the budget commissioners in the premises, will be concluded by the answer to a single question: Do the words "heretofore" and "hereafter," which occur in Section 5649-2, General Code, as amended April 16, 1913, and approved May 6, 1913, refer to the date of the passage of the original section on May 31, 1911, or to the date when the amendment became effective, to-wit, August 8, 1913? It is conceded that it is necessary for the defendants to levy the sum of \$196,074.47 for sinking-fund and interest purposes for bonds issued by the city of Cincinnati between the dates of June 2, 1911, and August 8, 1913, without a vote of the people. The original Section



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5649-2, which is part of the act known as the Smith one-per cent. law, was as follows:

"Sec. 5649-2. Except as otherwise provided in Section 5649-4 and Section 5649-5 of the General Code, the aggregate amount of taxes that may be levied on the taxable property in any county, township, city, village, school district or other taxing district, for the year 1911 and any year thereafter, including taxes levied under authority of Section 5649-1 of the General Code, and levies for state, county, township, municipal, school and all other purposes, shall not in any one year exceed in the aggregate the total amount of taxes that were levied upon the taxable property therein of such county, township, city, village, school district or other taxing district, for all purposes in the year 1910, provided, however, that the maximum rate of taxes that may be levied for all purposes, upon the taxable property therein, shall not in any one year exceed ten mills on each dollar of the tax valuation of the taxable property of such county, township, city, village, school district or other taxing district for that year, and such levies in addition thereto for sinking-fund and interest purposes as may be necessary to provide for any indebtedness heretofore incurred or any indebtedness that may hereafter be incurred by a vote of the people."

Experience demonstrated that it was not practicable to limit the political subdivisions named in that section in making up their levies for all purposes to the amount levied in the year 1910. Therefore, in 1913, the legislature passed the amendment referred to (103 O. L., 552). The amendment

## Opinion of the Court.

eliminated from the section the following language: "for the year 1911 and any year thereafter, including taxes levied under authority of Section 5649-1 of the General Code, and levies for state, county, township, municipal, school and all other purposes, shall not in any one year exceed in the aggregate the total amount of taxes that were levied upon the taxable property therein of such county, township, city, village, school district or other taxing district, for all purposes in the year 1910, provided, however, that the maximum rate of taxes that may be levied for all purposes, upon the taxable property therein, \* \* \*."

It is apparent that the single intent of the legislature in passing the amendment was to eliminate the requirement that the amount of taxes levied in any year should not exceed the aggregate amount levied for all purposes in the year 1910. The amended section is in the exact words of the original section with the exception of the elimination stated. Both contain the provision that the levy shall not in any year exceed ten mills on each dollar of the tax valuation of the taxable property of the county, township, city, village, school district or other taxing district for that year, and such levies in addition thereto for sinking-fund and interest purposes as may be necessary to provide for any indebtedness heretofore incurred or any indebtedness that may be hereafter incurred *by a vote* of the people. Between June 2, 1911, the date when the original act was approved, and August 8, 1913, when the amendment became effective, the city is-

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sued its bonds *without a vote* of the people for which it is necessary to provide sinking fund and interest. Therefore, if the word "heretofore" refers to the date June 2, 1911, the levy, including the sum for those purposes, must come within the limit of ten mills. If that word refers to the date on which the amendment became effective, the necessary amount for interest and sinking-fund purposes may be levied in addition to the limit of ten mills. The considerations which induced the legislature to pass the amendment would seem to be manifest. The provision in the original section that the levy for all purposes in the year 1910 should not be exceeded did not meet the requirements of growth in population, territory and property from time to time after that year in the different subdivisions. In a municipality or other subdivision in which there was a material growth in these respects it might be found that a sum which was sufficient in 1910 would be wholly inadequate under the new conditions. But the identity of the language of the amendment with the original section, in all other respects, manifests the satisfaction of the legislature with the provisions of the law as originally passed with the exceptions stated. There is an explicit preservation and continuance of the limitation of ten mills. It was evidently contemplated by the legislature that the increased requirements caused by growth would be met by a corresponding increase of taxable property. Generally the rule is that an amended statute is to be given the meaning that it would have had if it had read from the beginning

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as amended. This rule is stated in *McKibben v. Lester*, 9 Ohio St., 627, as follows: "Where one or more sections of a statute are amended by a new act, and the amendatory act contains the entire section or sections amended, and repeals the section or sections so amended, the section or sections as amended must be construed as though introduced into the place of the repealed section or sections in the original act, and, therefore, in view of the provisions of the original act, as it stands after the amendatory sections are so introduced." This rule was stated and followed in *State, ex rel., v. Cincinnati*, 52 Ohio St., 419, 445. The amending act provides that the original section "be amended to read as follows." The repeal of the original section was in compliance with Section 16 of Article II of the Constitution, which provides "no law shall be revived, or amended unless the new act contains the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed." The obvious purpose of this provision of the constitution was to avoid the confusion caused by the distribution of different parts of the same section in different enactments; but there was no intention to change the operation of the original section as to provisions which are not changed.

In 1 Lewis' Sutherland on Statutory Construction (2 ed.), Section 237, it is said: "The constitutional provision requiring amendments to be made by setting out the whole section as amended was not intended to make any different rule as to the effect of such amendments. So far as the sec-

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tion is changed it must receive a new operation, but so far as it is not changed it would be dangerous to hold that the mere nominal reenactment should have the effect of disturbing the whole body of statutes *in pari materia* which had been passed since the first enactment. There must be something in the nature of the new legislation to show such an intent with reasonable clearness. \* \* \* The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along; and the new parts or the changed portions are not to be taken to have been the law at any time prior to the passage of the amended act."

In Section 238 of his work the same author says: "Where there is an express repeal of an existing statute, and a reenactment of it at the same time, or a repeal and a reenactment of a portion of it, the reenactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where reenactment takes effect at the same time."

In *McLaughlin v. Newark*, 57 N. J. Law, 298, where a similar question was involved, the court say: "By observing the constitutional form of amending a section of a statute the legislature does not express an intention then to enact the whole section as amended, but only an intention then to enact the change which is indicated. Any other rule of construction would surely introduce unexpected results and work great inconvenience."

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Of course this rule would in no case be applied where the provisions of the amendment itself preclude, or where its application would produce, unreasonable or absurd results.

In *Parsons v. Wayne Circuit Judge*, 37 Mich., 287, an amendment was adopted twenty-two years after the original statute was passed. The amendment provided that actions on judgments "heretofore rendered" should be barred in ten years after entry thereof. The court held that, in view of the fact that it would be absurd to confine this provision to judgments rendered before the passage of the original act, the legislature intended that the words "heretofore rendered" in the amendment should apply as of the date of the amendment.

Judge Cooley in rendering the opinion remarks: "It is further urged that, as a rule of construction, a statute amended is to be understood in the same sense exactly as if it had read from the beginning as it does as amended. This is true as a rule. \* \* But such a rule of construction cannot be applied when the effect would be to defeat the manifest intent of the legislature in adopting the amendment. And such would be the effect in this case."

Authorities as to the time of the taking effect of a statute and of an amendment thereto are of no assistance in this case. Nor is there occasion to invoke the elementary rule that where the language used by the legislature is plain and free from doubt there is no room for construction. The inquiry is not, What is the meaning of words employed? nor When did the amendment take effect? but What

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period of time do the relative words in the amendment refer to?

The presumption is that when the legislature adopts an amendment it intends to make some change in the statute amended, and when it reenacts the original statute as amended it has then made the only change it desired to make, leaving the rest of the provisions undisturbed.

The amendment should be considered in connection with the whole statute of which it has become a part. What is the whole scheme of the law? What object was intended to be accomplished by it and what imperfections were intended to be removed by the amendment? There is no uncertainty as to these matters in connection with the statute here involved.

Municipalities incurring obligations without a vote of the people, after the passage of the original act did so with full knowledge of the duty resting on them to provide for their payment within the limit explicitly declared in the law. By no stretch of construction can it be discovered that the amendment was intended to approve of a disregard of the restriction for the period between the date of the original act and that of the amendment. The demurrer to the answer will be sustained and the peremptory writ prayed for will be allowed.

*Writ allowed.*

NICHOLS, C. J., WANAMAKER, NEWMAN and WILKIN, JJ., concur.

Opinion of the Court.

THE STATE, EX REL. McKEAN, v. GRAVES, SECRETARY OF STATE.

*Office and officer—Clerk of supreme court appointive officer—Section 1500, General Code (103 O. L., 10), constitutional.*

The act of February 4, 1913 (103 O. L., 10), so amending Section 1500, General Code, as to provide that this court shall appoint its own clerk, and repealing the original section which provided for his election by the electors of the state, is not repugnant to any provision of the constitution.

(No. 14669—Decided September 24, 1914.)

IN MANDAMUS.

Petition for a peremptory writ of mandamus to compel the defendant, as secretary of state, to certify the nomination of the relator as a candidate for clerk of the supreme court on the Democratic ticket to be voted at the general election in November, 1914.

*Mr. J. M. McGillivray*, for relator.

*Mr. Scott Stahl* and *Messrs. Price, Alburn & Daoust*, for defendant.

SHAUCK, J. The defendant has refused to certify the nomination of the relator as a candidate upon the ticket to be voted at the general election because on the 14th of February, 1913, Section 1500 of the General Code, which had theretofore provided for the election of a clerk of this court by the electors of the state, was so amended as to provide for his appointment by the court and the pre-



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vious section was repealed. The provision of the amending act for the appointment of a clerk by the court and the repeal of the previous statute providing for his election is admitted, and the question to be determined is made by the relator's challenge of the constitutional validity of the amending act.

Attention to the relation of its clerk to this court will aid in removing some doubts which appear in the argument. He is vested with no discretion in any respect. He is only an arm of the court for issuing its process, entering its judgments and performing like duties which the court itself might perform. His services are employed only for the more convenient performance of those functions of the court which are clerical in their nature. It is only in an arbitrary or secondary sense of the word "officer" that it can be applied to him. From the nature of his duties and his relation to the court, the power to appoint a clerk when necessary to the convenient and efficient exercise of its functions is inherent in the court, as are the like powers to punish for contempt, to appoint and remove members of the bar and to grant ancillary injunctions in the exercise of its jurisdiction in order that the status of a subject in controversy may remain unchanged, so that its jurisdiction when exercised will be effective. These powers inhere in the court without special grant, either in constitution or statute, because they are all implied in every conception of a court when courts are created by the constitution. Remembering that the judicial powers of government are all vested in the courts, and that such power is co-ordinate with and in no respect subordinate to

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the legislative power, it is entirely clear that in the absence of a special constitutional provision the general assembly is without authority to provide for the election of a clerk of this court. Such power is not embraced in the grant of legislative power to the general assembly. It is not embraced within any proper definition of that power, and the duties of the clerk of the court are the duties of the court itself and embraced within the grant of judicial power. This is obvious, not only from the character of his duties and his relation to the tribunal, but from the practice in the federal courts and the courts of the states where the subject is not affected by special provisions.

But in this state the mode of choosing clerks of local courts is affected by a section of the constitution of 1851, and it is claimed on behalf of the relator that the provision includes the clerk of this court and defeats the operation of the amending statute in question. It was doubtless in view of the fact that in our policy clerks of local courts are charged with duties of an administrative and political nature not relating to the exercise of the judicial function, it was ordained in Article IV, Section 16, that "There shall be elected in each county, by the electors thereof, one clerk of the court of common pleas, who shall hold his office for the term of three years, and until his successor shall be elected and qualified. He shall, by virtue of his office, be clerk of all other courts of record held therein; but, the general assembly may provide, by law, for the election of a clerk, with a like term of office, for each or any other of the courts of record,

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and may authorize the judge of the probate court to perform the duties of clerk for his court, \* \* \*." The subject of this provision obviously is courts of the counties. There is neither here nor elsewhere in the constitution any provision which contemplates an election of the clerk of any court by the electors of the state, and from the nature of the subject the provision is necessarily limited to local courts. The phraseology of the provision is doubtless affected in part by the provisions of the constitution of 1802, which made the supreme court a court in every county of the state by the express provision that it should in every year hold a session in each county of the state. It can of course have no application to this court as it is constituted by the constitution of 1851, a court of the state sitting only at the capital of the state. So obvious is this that the validity of the statute now under consideration prior to the amendment whose validity is challenged was always the subject of doubt, the better opinion apparently being that the statute in its previous form was unconstitutional as being without authority of the constitution and an invasion of the judicial power of the state. But its validity in that form was never judicially considered and it need not be considered now, for the constitutional provision does no more than to ordain that "the general assembly may provide, by law, for the election," etc. If it be conceded that the general assembly was thus enabled to enact the statute for the election of a clerk of this court by the electors of the state, the repeal of that statute

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leaves the court to exercise its inherent power to appoint its clerk without regard to the express provision of the amending act that the court shall appoint.

No inference favorable to the relator can be drawn from Article XVII of the Constitution. That article was adopted as an amendment to the constitution without designating any section of the instrument which was to be amended or abrogated. It changed former provisions only in the respects and to the extent which might be necessary to give effect to its provisions as the later expression of the will of the people, and it was subject, in all respects, to the rules relating to amendments and repeals by implication. *The State, ex rel., v. Creamer, Treas.*, 83 Ohio St., 412. Terms of the article evince that its sole purpose was to substitute biennial for annual elections. It did not purport to change the character of any officer as elective or appointive, but only to fix the time for election of officers which by other provisions were to be chosen by the electors of the state. The article could not have the effect to modify any provision of the constitution except for the purpose indicated and to the extent which might be requisite for the accomplishment of that purpose.

It may be that the provision of the amending act under consideration, that the clerk shall be appointed by the court, is without effect. Whether it is or not need not be considered, the court having ample authority without any aid from the legislature to appoint a clerk in the absence of valid

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provisions providing for his selection in another mode.

*Writ refused.*

JOHNSON, DONAHUE, NEWMAN and WILKIN,  
JJ., concur.

WANAMAKER, J., dissents.

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THE CITY OF WELLSVILLE ET AL. *v.* CONNOR.

*Elections—Municipal bond issue—Section 3939 et seq., General Code—Two-thirds vote—Blank or unintelligible ballots not considered, when—Section 3947, General Code.*

1. Where the question of issuing bonds by a municipality pursuant to Section 3939 *et seq.*, General Code, is submitted to the electors at a special or general election, in ascertaining whether two-thirds of the voters voting at such election upon the question of issuing the bonds have voted in favor thereof, as required by Section 3947, blank ballots or unintelligible ballots are not to be considered.
2. Where a voter at an election duly held does not by his ballot express his choice for an office to be filled, or on a question submitted to the electors, his ballot should not be counted for such office or on the question. But if it is required by law that a majority or any certain proportion of the votes cast at the election should be in favor of a proposition in order that it should carry, then all the votes cast at the election, including blank and unintelligible ballots, must be considered.

(No. 14446—Decided September 29, 1914.)

ERROR to the Court of Appeals of Columbiana county.

The facts are stated in the opinion.

## Opinion of the Court.

*Mr. G. W. Adams and Mr. W. A. O'Grady*, city solicitors, for plaintiffs in error.

*Messrs. Brookes & Thompson and Messrs. Billingsley, Moore & Van Fossan*, for defendant in error.

JOHNSON, J. This was a proceeding brought in the common pleas of Columbiana county to enjoin the issuing of bonds by the city of Wellsville for the purpose of constructing a municipal electric-lighting plant. The council of the city on August 30, 1912, passed a resolution declaring the necessity for the issuance of bonds for the purpose stated. The resolution provided that the question should be submitted to the qualified electors of the city on the day of the regular election to be held on the 5th of November, 1912. The action referred to was taken under the provisions of Sections 3939 to 3947, inclusive, of the General Code. The proposition was voted on at a special election held on the day named. The special election was conducted independently of the general election. Separate ballots and ballot boxes were provided, but the special election was under the control and supervision of the officers duly appointed to conduct the general election held on that day. The certificate of the mayor and city auditor, filed as required by law, stated that the votes cast in favor of the proposition were more than two-thirds of the total number of votes cast on the proposition. The petition sets forth a number of different grounds upon which the relief was prayed for, among them being that

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"two-thirds of the voters voting at said pretended election held November 5, 1912, did not vote in favor of issuing said bonds." There was a general denial of these allegations in the answer.

The court of common pleas enjoined the issue and on appeal the court of appeals entered the same decree. It is stated in the entry of the decree of the latter court that "two-thirds of the voters of said city voting upon said proposition did not vote in favor of issuing said bonds, and the defendants are therefore without lawful authority to issue and sell said bonds." The determination of the issues made by the pleadings involved the construction of the statute under which the election was held.

It is conceded that there were a number of blank ballots and a number of unintelligible ballots cast at the election and that if these should be counted against the proposition it would be lost. The court below was of the opinion that before the proposition could be adopted it was necessary that two-thirds of all of the votes cast at the election should be in its favor.

Section 3947, General Code, is as follows: "If two-thirds of the voters voting at such election upon the question of issuing the bonds vote in favor thereof, the bonds shall be issued. Those who vote in favor of the proposition shall have written or printed on their ballots, 'For the issue of bonds'; and those who vote against it shall have written or printed on their ballots, 'Against the issue of bonds.'"

The cases of *Enyart et al. v. The Trustees of Hanover Township*, 25 Ohio St., 618, and *The*

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*State, ex rel., v. Foraker, Governor*, 46 Ohio St., 677, are cited by the defendant in error in support of the judgment below.

In the former case it was held that "Where an act of the legislature authorized the trustees of a township to levy a special tax, with a proviso 'that said trustees shall not cause said levy to be made until a majority of the electors of said township, at some regular election, shall vote in favor of said levy,' it required a majority of all the votes cast at such regular election, and not simply a majority of those voting for or against the levy."

The court say: "In this case the entire number of votes cast for president and vice-president furnished the basis by which it is to be determined whether or not the levy was authorized." The statute itself fixed the proportion required — a majority of electors at some regular election.

In *The State, ex rel., v. Foraker, Governor, supra*, an amendment to the constitution was submitted under the provisions of Section 1 of Article XVI of that instrument which provided for the publication of the proposed amendment prior to the next election for senators and representatives, and "if a majority of the electors, *voting at such election*, shall adopt such amendments, the same shall become a part of the constitution."

The court held that a majority of all the votes cast at the "election for senators and representatives" was required for the adoption of such an amendment. In the opinion of the court it is pointed out that the constitution makes a different requirement as to an amendment submitted by a conven-



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tion called for that purpose in pursuance of the constitution from that made in Section 1 of Article XVI. It is provided in Section 3, Article XVI, that no amendment submitted by a convention called for that purpose shall take effect until submitted to the electors of the state and adopted by a majority of those "voting thereon." But as to an amendment submitted by the legislature Section 1, Article XVI, as then in force, provided that the proposed amendment should be published prior to an election for senators and representatives and if a majority of electors "voting at such election" shall adopt such amendment, the same shall be a part of the constitution.

The court say: "If then it was intended that a majority of those voting on an amendment, submitted by the legislature, should be sufficient to adopt it, the question arises, why language equally clear and explicit was not adopted to express such intention in the one case as well as in the other; or why, instead of limiting the provision contained in section 3 to amendments 'agreed upon by any convention,' it was not extended so as to include an amendment submitted by any legislature. It would have been natural, and it is probable, that if the framers had had the same intention in framing section 1 as in framing section 3, as to how the majority for the adoption of an amendment should be ascertained, they would have provided in that section as in section 3, that it should be a majority 'of those voting thereon' instead of a majority 'of the electors voting at such election.' Such a plain difference of language indicates a plain difference

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of intention." The difference of requirement and intention indicated by the court in that case is plainly disclosed in the language used by the legislature in Section 3947 above quoted. It will be noted that the provision is, "If two-thirds of the voters voting at such election *upon the question of issuing the bonds* vote in favor thereof," etc.

Section 5070, General Code, provides rules which the elector shall observe in marking his ballot. Subdivision 7 of that section provides: "If the elector marks more names than there are persons to be elected to an office, or if, for any reason, it is impossible to determine the voter's choice for an office to be filled, his ballot shall not be counted for such office."

By analogy, if it is impossible to determine the answer of an elector to a question submitted at the election, his ballot should not be counted upon that question. A ballot is merely the instrument by which a voter expresses his choice between candidates or on a question, and where the voter expresses no choice he has not voted for either candidate nor on the question. If upon any proposition the law requires that there shall be a majority of the votes cast at the election in order that the proposition should carry, it would be necessary to reckon with his vote. But if it is necessary to have a majority of those voting at such an election upon the question, his vote would not be reckoned with, for he did not vote upon the question.

In order to prevent the casting of more than one ballot by any elector on any pretext the legislature

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provided in Section 5075, General Code, that when a person has received an official ballot from an election officer, and has delivered it to the officer in charge of the ballot box at the time, and such ballot has been deposited in the ballot box, such person shall be deemed to have voted. The elector who has thus caused a ballot to be deposited has exhausted his privilege. A number of cases have been gathered and cited in the briefs. An examination of them discloses that courts have adopted the interpretation required by the language of the respective statutes involved. We think the court of appeals erred in its judgment for the reasons stated. There were other grounds stated in the petition for injunction which were met by the answer. The contentions of the parties as supported by the record have been carefully examined by us and upon these we think that the issue must be resolved in favor of the defendants.

The judgment of the court of appeals will be reversed and the petition of the plaintiff dismissed.

*Judgment reversed.*

NICHOLS, C. J., DONAHUE, WANAMAKER and WILKIN, JJ., concur.

Opinion of the Court.

THE COLUMBUS GAS & FUEL CO. v. THE KNOX  
COUNTY OIL & GAS CO.

*Lessor and lessee—Rights and liabilities of lessee and his assignee  
for rents—Section 12206, General Code—Sureties—Oil lease—  
Liability of assignee for royalties.*

(No. 13949—Decided October 13, 1914.)

ERROR to the Circuit Court of Knox county.

*Mr. Frederick N. Sinks and Messrs. H. H. &  
R. M. Greer, for plaintiff in error.*

*Mr. F. O. Levering, for defendant in error.*

BY THE COURT. The lessee of real estate is liable by the terms of his contract for the rents accruing during the entire term of the lease. In the absence of a contract assuming further liability the assignee of a lease is liable only for the rent accruing while he enjoys the estate. In such case the lessee stands in relation of surety to the assignee of the lease, and may maintain an action against the assignee of the lease under the provisions of Section 12206, General Code. *Sutliff v. Atwood*, 15 Ohio St., 186; *McHenry v. Carson*, 41 Ohio St., 212.

Where a lease of premises for oil and gas provides that a sum certain shall be paid each year as royalty on the gas produced from each well and marketed off the premises, and the lessee operates the lease, markets the gas from wells thereon for a portion of the year and thereafter assigns the lease, the assignee, in the absence of a special contract, is not liable for the royalties accruing on

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wells, the product of which was marketed off the premises prior to the assignment of the lease, regardless of when these royalties become due and payable, but the assignee of the lease is liable for the royalties accruing during the time he markets the product and enjoys the estate.

*Judgment affirmed.*

NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE,  
WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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THE STATE, EX REL. MURPHY, *v.* GRAVES,  
SECRETARY OF STATE, ETC.

*Elections—Primaries—Nominee must be affiliated with party nominating.*

Under the existing law providing for primary elections a voter who is affiliated with one party cannot be nominated at such primary as a candidate for office upon a ticket of any other party.

(No. 14750—Decided October 15, 1914.)

IN MANDAMUS.

Facts are stated in opinion.

*Mr. F. S. Monnett*, for relator.

*Mr. Timothy S. Hogan*, attorney general; *Mr. Charles Follett* and *Mr. James I. Boulger*, for respondent.

## Opinion of the Court.

WANAMAKER, J. The relator, James V. Murphy, as an elector and resident of the county of Mahoning and state of Ohio, brings an action in mandamus against the secretary of state, praying for an order of this court directing said secretary of state to certify his name as one of the candidates for judge of the supreme court of Ohio.

The facts upon which he relies, as shown by the pleadings, are in brief as follows: That at the state-wide primary held on the 11th day of August, 1914, the secretary of state, as state supervisor of elections, had printed and distributed primary ballots for use at said primary election; that one of said primary ballots was designated "Republican," another designated "Democratic," another designated "Progressive;" that on the Republican ballot there were two or more printed names of candidates, on the Democratic ballot two or more printed names of candidates and that on the Progressive ballot there were no printed names of candidates; that the relator's name was written on four of the Progressive ballots for judge of the supreme court, which fact was certified to the secretary of state by the deputy state supervisors and inspectors of elections for said Mahoning county, and that the secretary of state refused to certify the relator's name as being legally nominated for judge of the supreme court of Ohio as a result of the vote had at such August primary election. This is in substance the relator's claims as set forth in his petition.

The answer, so far as it is relevant to this case, avers the fact to be that the "relator never has been, is not now, and was not at the time of said primary

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election, a member of said Progressive party, but, on the contrary, was a member of the Republican party" and voted as such Republican on said August 11, 1914.

The relator filed a reply, but in nowise denies the truth of the foregoing facts appearing in the answer. Should the writ issue?

Mandamus is generally defined as "an action or judicial proceeding of a civil nature, extraordinary in the sense that it can be maintained only when there is no other adequate remedy, prerogative in its character to the extent that the issue of both the alternative and peremptory or final command is *discretionary*, to enforce only *clear legal rights*," etc. 26 Cyc., 139, and cases cited.

A writ of mandamus is at common law regarded as "a high prerogative writ." It is employed to prevent a failure of justice and is only allowed to a party showing a clear legal right to the relief sought. *State, ex rel., v. Berry*, 14 Ohio St., 315; *State, ex rel., v. Smith*, 71 Ohio St., 13.

The right to a peremptory writ of mandamus by a relator must be predicated on the clear legal right of the relator and the inherent natural justice of his claims.

Applying these legal and equitable principles to the case at bar, how stands the relator? At this primary there were cast in excess of 440,000 votes, over 8,000 of which were cast for the Progressive ticket. The total vote cast for the relator for judge of the supreme court was four, one-twentieth of one per cent. of the total vote cast for the Progressive ticket. The relator himself was not at the time

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and never had been a member of the Progressive party. On the contrary, he appeared at the primary on that day and voted a Republican ticket, thereby declaring himself a Republican. Under existing law the primary is necessarily a party primary. Wisely or unwisely, there is no provision made for the independent voter. The members of a party are presumed to act as the members of a lodge, or the members of a church, or of any other voluntary organization, to select representatives of their lodge, church or such association, to fill certain offices and discharge certain trusts.

By an examination of the primary statutes, Sections 4952 (as amended 103 O. L., 476), 4977, 4980, 4981, 4982, 4969, 4970 and 4973, General Code, all combine to demonstrate the soundness of this position. The voters signing the original petition must certify that they are members of the party whose nomination is sought, and some one signer must make oath to that effect. The candidate also makes a declaration that he will abide by the principles enumerated by his political party. But, more than that, the statutes, especially Section 4980, General Code, provide as to who are legally qualified electors at such primary. The language of the statute is as follows:

“At such election only legally qualified electors or such as will be legally qualified electors at the next ensuing general election may vote and all such electors may vote only in the election precinct where they reside, and it shall be the duty of the challengers and of the judges, and the right of any elector, whenever there is reason to doubt the legal-



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ity of any vote that may be offered, to interpose a challenge. The cause of a challenge shall be: That the person challenged has received or been promised some valuable reward or consideration for his vote; that he has not previously affiliated with the party whose ticket he now desires to vote. Affiliation shall be determined by the vote of the elector making application to vote, at the last general election held in even-numbered years."

Sections 4981 and 4982 provide as to how the challenge shall be tried and that the judges of the party with whom the voter claims affiliation are the judges to finally determine his qualifications as a legal voter.

Suppose the relator in this case had presented himself to the judges of the primary, represented himself as a Republican and asked for a Progressive ticket to vote the same. Would there be any doubt about the judges' right and duty to refuse him a ticket? Under the statutes he would not be a qualified legal voter at such Progressive party primary. If he is not a qualified voter, it is difficult to understand how he could be a qualified candidate. The same spirit runs throughout as to the voter and candidate in connection with the party primary. Indeed, it may well be doubted whether or not at the party primaries the voter may write in any name. He may do so at a general election where the purpose is to get at the wishes of the majority of the voters as to the candidates for office or public policies, but the purpose of the primary is to enable the rank and file of each party to nominate the party's representatives for public

## Statement of the Case.

office. It is unnecessary, however, to determine that question here.

The relator cannot as a Republican consistently claim a Progressive nomination. The natural justice of the situation, as well as the clear legal right, is against him, and the secretary of state rightly denied him a place on the ticket.

The writ of mandamus is, therefore, refused.

*Writ refused.*

SHAUCK, JOHNSON, DONAHUE and NEWMAN, JJ., concur.

NICHOLS, C. J., and WILKIN, J., not participating.

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HOOVER v. THE STATE OF OHIO.

*Criminal law—Murder—Evidence—Impeachment—Testimony of physicians—Rebuttal—Admission and competency of evidence—Expert witnesses—Hypothetical question—Charge to jury—Preponderance of evidence.*

(No. 14505—Decided October 15, 1914.)

ERROR to the Court of Appeals of Van Wert county.

The facts are stated in the opinion.

*Messrs. Blachly & Kerns and Messrs. Dailey & Hoke*, for plaintiff in error.

*Mr. Clark Good*, prosecuting attorney, and *Mr. H. L. Conn*, for defendant in error.

## Opinion of the Court.

BY THE COURT. The plaintiff in error was indicted by the grand jury of Van Wert county for the murder of his wife, Helen Hoover. On the trial in the court of common pleas of Van Wert in April, 1913, by the verdict of a jury the plaintiff in error was found guilty of murder in the second degree. From the judgment entered on this verdict error was prosecuted to the court of appeals of Van Wert and the judgment was by that court affirmed. Error is prosecuted here to reverse the judgment below.

The deceased died from the effects of wounds inflicted by bullets fired from a revolver into her head a number of days before she died. The tragedy occurred at her home in the country, where she lived with her husband.

There was no direct testimony in the case as to who fired the shots.

The defendant below and his wife were a young couple, who had been schoolmates and close associates for a long time prior to their marriage.

In April, 1912, the father of decedent called on the defendant, and in the presence of his father accused him of having disgraced his daughter. The result of the conference then held was that the parties were married on the following day and went to live with defendant's father.

At the time of the marriage he was about 18 years old and she was a year younger. They remained at his father's about three months when, at the request of his parents, she went to live at her parents' home, he remaining with his parents. In the following October they went to live in their

## Opinion of the Court.

own home on his father's farm. They lived together there until the tragedy, which occurred about nine months after their marriage.

The defendant in his testimony gave an account of his movements and whereabouts on the day of the shooting. He stated that he was engaged in work on the farm; that he took dinner at his father's house; that he was in and out of his own house during the day; that he was there about two o'clock in the afternoon and had a short talk with his wife, who was complaining of a headache; that he then went to his father's barn, about one-half mile away, with a team to haul fodder; that about half-past four he went back home; that when he arrived he found his wife lying on the floor in the sitting room with the bullet wounds in her head; that he telephoned to his mother, told her "there has been a man in here some time this afternoon and shot Helen" and asked her to come quick; that the reason he said there had been a man there and shot his wife was because she had told him so. He denied that there had been any trouble between him and his wife between their marriage and her death, and stated that they had never had a fuss. He testified that the mother of his wife arrived at the house in the afternoon of the following day and that her treatment of him was not friendly.

The plaintiff in error urges that the evidence against him was all circumstantial and more consistent with the theory of suicide than of murder, and that there was prejudicial error in the admission of testimony. As to the latter, it is insisted in the first place that the court erred in admitting

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the testimony of certain physicians in rebuttal. The state, in order to maintain its case in chief, had offered the testimony of experts, several physicians, to show that either one of the two principal wounds, which they discovered had been inflicted upon the deceased, would have caused immediate unconsciousness. The defendant called his mother as a witness, who testified that she had found the decedent soon after she had been called to the home, lying on the floor; had gotten down on the floor and put her hand over her head; had washed her face and bathed her head and asked her if a man had come into the house and shot her. She testified that the deceased shook her head "yes," and in answer to the question whether she knew the man she shook her head "no." The mother testified to other acts of consciousness of the deceased at that interview of a similar character. Two physicians were called on behalf of the defendant who testified that they saw the deceased about five o'clock in the afternoon. They gave it as their opinion that the deceased might have spoken within an hour preceding that time, and these physicians testified that neither of the wounds would necessarily have caused immediate unconsciousness.

The state in rebuttal was permitted, over the objection of the defendant, to offer evidence that these wounds would have caused immediate unconsciousness, and one of the witnesses so testifying was a physician who had already testified to the same effect in chief. We think that the admission of this evidence in rebuttal was proper. The evi-

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dence offered in chief was competent as showing the nature and extent of the wounds that the deceased had received, the effect that they necessarily had upon her and that they naturally resulted in her death. This testimony contributed to the making out of the case which the state was compelled to establish in chief. The testimony of the physicians, which was received in rebuttal, although substantially to the same effect, was competent in support of the effort to contradict the testimony of the mother of the defendant. Even if it be said that it was merely cumulative, its admission in rebuttal cannot be said to be an abuse of the discretion of the court in view of the testimony of the mother with reference to the consciousness of the deceased at the time stated.

It is also insisted that the trial court erred in admitting evidence of an impeaching nature with reference to the testimony of the attending physician. This witness described his visit to and examination of the deceased. He had fully detailed the entire situation as he found it, the location, nature and extent of the wounds, the treatment of them and the progress of the case till the death of Mrs. Hoover. He was asked as to the probability of the wounds having been self-inflicted and answered "it is very possible they could be." He was asked on cross-examination, among other questions seeking to impeach his testimony, if he had not on another occasion, to a third person, made statements that were inconsistent with the answer referred to. The physician having denied that he remembered making any such statement, the state was permitted

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in rebuttal, over the objection of defendant, to offer testimony showing that the physician had made the statements referred to.

The testimony of an expert witness, in which he gives an opinion concerning a state of facts given in a hypothetical question, cannot be impeached by testimony that he had at another time expressed an opinion as to the actual transaction which was different from his expert opinion on the state of facts as contained in the question. A witness might have an opinion definite and conclusive with reference to a state of facts given in a question, and yet at the same time he might have received impressions which were caused by wholly extraneous circumstances or by hearsay and unreliable report which would lead him to hold and express a different belief as to the real state of facts. It would be unsafe and wholly improper to admit testimony concerning statements of that belief made at other times. On the other hand, it would be perfectly proper, where an expert had given on the witness stand an opinion concerning a state of facts contained in a hypothetical question, to show by way of impeachment that at other times he had given another opinion concerning the same state of facts. In this case the witness was the attending physician, constantly seeing the patient from time to time, and the question put to him by the defendant's counsel called for his opinion based upon his personal knowledge gathered from his frequent examinations of the deceased. It was, therefore, proper for the state to show that the witness had made contradictory statements at other times as to what his

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opinion was concerning the same state of facts, knowledge of which he had acquired in the manner stated. It was for the jury to determine what weight was to be given to the testimony concerning the contradictory statement, and whether it was sufficient to shake their belief in the testimony given by the physician in chief. It is urged also that the court erred in the admission of the testimony of certain witnesses, one of whom was the nurse of the deceased, to the effect that in answer to certain questions by her mother while the defendant was standing by the bedside she had assented to an accusation by the mother that he had done the shooting. It is urged that the defendant did not understand that he was being charged with having shot his wife, but that his mother-in-law was trying to get his wife to so charge him; that immediately after the talk the defendant, in another room, denied the charge, and by what he said and did showed that he did not think that his wife had charged him, but did think that his mother-in-law was trying to get her to so charge him; and that under the circumstances he was not called upon, and it would have been unseemly for him, to have taken issue with anything his wife said or did or to have become involved in a controversy with his mother-in-law. These suggestions were very proper to be urged upon the jury with reference to the weight that was to be given to the testimony concerning the transaction by the bedside, but they do not affect its competency.

The court in its charge to the jury carefully preserved the rights of the defendant and cautioned



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them not to give undue weight to the situation disclosed. At the request of counsel for the defendant the court instructed the jury, before argument, as follows: "Testimony has been admitted in the trial of this case tending to show that on Saturday evening, January 11, 1913, a conversation between Mrs. Drake and her daughter, Helen Hoover, the deceased, was had in the presence and hearing of the defendant, Ralph Hoover, and that defendant was silent and left the room without speaking. You are instructed that such silence is not a confession by the defendant of the commission of the crime charged in the indictment in this case, or of any crime, and that in themselves that conversation and defendant's silence are not sufficient to authorize a conviction of the defendant in this case. That evidence was admitted only for the purpose of allowing you to consider his conduct at that time and place, as tending, in connection with evidence of other facts, to prove the defendant guilty of the charge made against him by the indictment or included within its terms, and it is your duty to consider it for no other purpose whatever."

In the general charge the court said to the jury: "Such evidence should be received and considered with care and caution, and with proper consideration of all circumstances and conditions that would be likely to influence the action of the defendant with a view to determining the motive that induced his silence, if you find he was silent. If it be doubtful whether the statements were perfectly heard or understood, by the defendant, or circumstances existed which might prevent a reply, or render it

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improper or inexpedient to reply, or if his silence may be attributable to any motive other than acquiescence in the truth of the statement to which his silent assent is claimed, the evidence would then be entitled to no weight or consideration for any purpose. It is your duty to follow the instruction of the court as to the purpose for which such evidence may be considered, and it is your province to determine the weight to be given such evidence for the purpose stated." The views we have expressed on the questions stated are fully sustained by the authorities cited in the briefs of counsel. There are other assignments, all of which we have carefully considered, but we have found no prejudicial error in the record.

As already stated, it is urged by the plaintiff in error that the evidence was all circumstantial and more consistent with the theory of suicide than murder. This view of the case was urged upon us with great earnestness and with reasoning that was persuasive. There was a great amount of testimony in the case, covering every phase of the unfortunate matter, to sustain the views of the different parties. Like most cases which rest upon circumstantial evidence, much is said in argument on both sides. This court does not consider the evidence in cases for the purpose of determining where the preponderance is, and there could be no better example of the propriety of the rule than is furnished by this case. The jury and the trial court saw the witnesses and heard their testimony. They had an opportunity to form an opinion and

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arrive at a conclusion as to the truth of the matter, which was far superior to the opportunity we have.

The court of appeals, in the performance of its duty to weigh the evidence, has affirmed the action of the triers below in that respect as in all others.

The judgment will be affirmed.

*Judgment affirmed.*

NICHOLS, C. J., SHAUCK, JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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THE STATE OF OHIO *v.* CAMERON ET AL.

*Criminal law—Embezzlement—Public moneys loaned to bank—Aider and abettor—Knowledge—Sections 12873, 12874 and 13674, General Code.*

(No. 14392—Decided October 15, 1914.)

EXCEPTIONS by the Prosecuting Attorney to a Decision of the Court of Common Pleas of Franklin county.

Isaac B. Cameron, former treasurer of state, was indicted at the April term, 1913, of the Franklin county court of common pleas upon four counts for embezzlement of state funds which were in his official custody on or about May 5, 1903, for safe-keeping and disbursement according to law. The first count charges that he unlawfully converted to his own use \$125,000; the second count charges

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that he converted the money to the use of The Columbus Savings & Trust Company; the third count that he lent the money to the said company; and the fourth count that he unlawfully deposited the money with said company. In each count it is jointly charged that Cyrus Huling, as president of said company, unlawfully and wilfully did aid, abet, encourage and procure Cameron to commit the crime therein alleged.

Upon the motion of Cameron and Huling, with the consent of the prosecuting attorney, the court ordered the prosecuting attorney to file a "bill of particulars," which was done. In this bill the prosecutor sets forth a more particular statement of the transaction alleged in the indictment, and concludes by saying the court may treat the bill of particulars as part of the record when passing upon any demurrer or special plea that may be entered to the indictment.

A demurrer was subsequently filed by each defendant, objecting, first, that no separate count charges an offense punishable by the laws of Ohio, and, second, that the intent is not alleged in any of the counts. The journal recites that the demurrers to the indictment and bill of particulars came on to be heard and were argued and submitted. The court sustained each demurrer and discharged both of the accused.

The prosecuting attorney brings the record here upon exceptions under the provisions of Section 13682, General Code.

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*Mr. Edward C. Turner*, prosecuting attorney; *Mr. T. S. Hogan*, attorney general, and *Mr. James I. Boulger*, for the exceptions.

*Mr. James M. Butler*; *Mr. Smith W. Bennett*; *Mr. O. E. Harrison*; *Mr. J. J. Chester* and *Mr. M. A. Daugherty*, against the exceptions.

BY THE COURT. We will first consider the case of *Mr. Cameron*. It is ruled by the principle laid down in *The State v. Baxter*, 89 Ohio St., 269. That was a prosecution of an officer of the state for converting public money temporarily to his own use in violation of Section 12876, General Code. This court decided that the fact that the accused returned money of equal amount to the trust fund before his secret appropriation of it became known, was no defense to the charge of embezzlement, and that it is the design and policy of that section and kindred statutes to prevent public officers and agents from using public funds in their possession or under their control in any manner or for any purpose not expressly authorized by law.

Counsel for *Cameron* do not question the validity of that principle, but they endeavor to distinguish this case from the *Baxter* case. They treat this case as founded upon Section 12873, General Code. As the prosecuting attorney and the court below so treated it, we shall so consider it for the purpose of passing upon the exceptions to the decision below.

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By way of raising the distinction, which they would have us adopt, they recite the original enactment of this law in Section 15 of the "Act to establish an independent treasury of the state of Ohio," passed April 12, 1858 (55 O. L., 49; 2 S. & C. Stats., 1610). That act is somewhat prolix, after the style of ancient statutes, and the codifiers have pruned its language and subdivided its contents without changing its essential structure or substance. It was reenacted in the Revised Statutes as Sections 6841 and 7299. Section 6841 was again subdivided into Sections 12873 and 12874 in the General Code and Section 7299 reappears as Section 13674. Section 12873 sets forth what acts shall constitute this crime of embezzlement, and the imprisonment and the fine which shall be inflicted upon the embezzler. Section 12874 provides that the fine shall operate as a judgment upon the estate of the embezzler and be enforced by execution or other process for the use only of the owner of the money or other funds so embezzled. Section 13674, now placed in the chapter entitled "Trial and Proceedings Incident Thereto," under the subtitle "Evidence," describes what facts shall be *prima facie* proof of the commission of the crime.

Our discussion will neither be simplified nor clarified by quoting here the old statute verbatim; it would occupy four pages of this report. The bone of contention will clearly appear by bringing together the three parts of this old law, in their original consecutive order and essential form, but

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purged of useless verbiage, as they have stood in the Revised Statutes for 35 years.

"Sec. 12873. Whoever, being charged with the collection, receipt, safekeeping, transfer or disbursement of public money \* \* \* belonging to the state, \* \* \* converts to his own use, or to the use of any other person, body corporate, association or party, or uses by way of investment in any kind of security, stock, loan, \* \* \* or in any other manner or form, or loans with or without interest to a company, corporation, association or individual, or, except as provided by law, deposits with a company, corporation or individual, public money or other funds, controlled or held by him for safekeeping or in trust for a specific purpose, transfer or disbursement, or in any other way or manner, or for any other purpose, shall be guilty of embezzlement of the money \* \* \* thus converted, used, invested, loaned, deposited or paid out, and shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years and fined double the amount of money \* \* \* embezzled. (R. S. Sec. 6841.)

"Sec. 12874. The fine, provided for in the next preceding section, shall operate as a judgment at law on all of the estate of the person sentenced and be enforced to collection by execution or other process for the use only of the owner of the property or effects so embezzled, and such fine shall only be released or entered as satisfied by the person in interest as aforesaid. (R. S. Sec. 6841.)

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"Sec. 13674. Failure or refusal to pay over, or produce the public money, or part thereof, by an officer or other person charged with the collection, receipt, transfer, disbursement or safe-keeping of such money, or part thereof, whether belonging to the state, or a county, township, municipal corporation or board of education in this state, or other public money, or to account to, or make settlement with a legal authority, of the official accounts of such officer or person, shall be *prima facie* evidence of the embezzlement thereof. Upon the trial of such officer or person for the embezzlement of public money under any provision of law, it shall be sufficient evidence, for the purpose of showing a balance against him, to produce a transcript from the books of the auditor of state, auditor of the county or the records of the commissioners of the county. The refusal of such officer or person, whether in or out of office, to pay a draft, order or warrant drawn upon him by an authorized officer, for public money in his hands, or a refusal by a person or public officer to promptly pay over to his successor public money or securities on the legal requirement of an authorized officer of the state or county, on the trial of an indictment against him for embezzlement, shall be *prima facie* evidence thereof. (R. S. Sec. 7299)."

Now, reading the sections as if they were one, counsel for Mr. Cameron say (to use their own language): "This statute means that the method of *fraudulently* appropriating public money in the manner set out in the statute shall constitute em-



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bezzlement. But there must be fraudulent appropriation. The owner must be deprived of his property. The officer must fail to account. There must be a default. It means that if the money is lost the officer will not be heard to say that he did not intend to embezzle it. That if it is lost he will be held for embezzlement."

Here we have precisely the same question which was raised in the Baxter case, *supra*. The statute in that case, Section 12876, reads: "Whoever, being elected or appointed to an office of public trust or profit, \* \* \* embezzles or converts to his own use, \* \* \* anything of value that shall come into his possession by virtue of such office or employment, is guilty of embezzlement."

We held that (1) the temporary appropriation of the public money by an officer to his own use, with the intention of restoring it, is a conversion within the meaning of that statute; (2) that he thereby violates that statute though he be not a defaulter, and (3) the return of the money will not expunge the guilt.

Counsel do not ask us to reverse that ruling, but they would persuade us that the three sections above quoted, taken together as one, define a different offense than that defined in Section 12876 and require that the money converted, loaned or deposited be *lost* and not *recovered* into the state treasury, before the embezzlement is complete.

It would be a tedious task and a futile consumption of time and space, if we would review in detail the able argument of the learned counsel of the accused in their exhaustive brief of 225 pages.

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They give us a critical analysis and comparison of all the legislation of Ohio upon the subject of embezzlement from the year 1836 to the present time, together with the judicial utterance of the courts of this and many other states upon every phase of the particular problem at hand. We must content ourselves with a statement of their principal and controlling proposition.

It is in short this: The interweaving of that part, which appears above as Section 12874, into the very web and woof of the original statute of 1858, makes that a part of the very definition of the crime, and manifests that the legislative mind contemplated that the converting, using, loaning, investing or depositing of public money, "which is hereby declared to be a high crime," must result in its loss to somebody.

They observe that if there be a crime, then a fine of double the amount embezzled must be inflicted, as a part of the penalty, for the use of the owner of the money. They argue that this implies that the owner shall have lost his money, for if the money be returned with interest, and if the officer who appropriated it only temporarily must, in addition to its return, pay to the owner *double* the amount so returned as a penalty for the temporary misappropriation, then the owner, be he a citizen or the state itself, recovers his money threefold.

Grant this is a possible result of the construction contended for by the state, is it such cruel and unusual punishment, in contravention of the constitution of the state (Article I, Section 9), as demonstrates that the legislature did not intend

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such a result? The student who has gleaned his knowledge of the history of the common law from Blackstone only, well knows that treble damages have been awarded for many forms of mere civil delict, from the days of the Saxon freemen down to the present times. Nay, more, in most if not all of the states of this Union treble damages are still allowed for trespass, waste, nuisance and other private injuries, even without violence or intentional wrong; and in our own state today there is no limit on the punitive damage a jury may award, in addition to the just recompense for personal wrongs involving the elements of fraud, malice, insult or wanton cruelty.

Our attention is called to the circumstance that the description of the evidence which is sufficient to make *prima facie* proof of the crime, was originally included in the section of the statute which defined the crime itself. But this does not make that description of the evidence a part of the definition of the crime. The latter belongs to the domain of positive law, while the former is a part of the adjective law. The function which each of the two things performs in the legal system determines its essential character. The former is now in the proper place in the Code, where it belongs according to logical classification. Confusion of ideas arises when we blend the two distinct concepts in thought as one, and this leads to false interpretation. The purpose of legal analysis is to discriminate and distinguish between things which are separable and different. The authors of the law did not blend and confuse the crime with

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the evidence and the remedy, although they combined the description of all three in a single section; one follows the other and each is complete in itself, thus: First, the crime; second, the penalty and the use to be made of the money penalty; and third, the *prima facie* evidence of the commission of the crime. Each is as distinct as if they had been enacted as separate sections, as they now appear in the more scientific arrangement of our Code.

Nor is there any force in the argument that the legislature never intended to inflict a fine in double the amount embezzled, to be enforced for the use of the owner, if the owner's money be returned before prosecution or conviction. This is but another form of the defense presented in the Baxter case, namely, that reparation obliterates the crime. We rejected that defense, holding that the unlawful appropriation of public money for any purpose not allowed by law constitutes the crime. So in this case, the crime was complete before the money was restored, and the penalty prescribed by the law must follow conviction, no matter for whose use it is recovered, nor whether it repairs the loss threefold or only twofold. The prosecution is not to recompense the loser but to punish the offender. The circumstance that the statute incidentally seeks to enforce repayment of the money to the loser, is just as immaterial to the question of the guilt of the accused as is the other fact that the accused has already repaid the money. The material fact, admitted by the demurrer to be true, is that this constitutional officer of the state, having in custody public money for safekeeping and disbursement ac-

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cording to law, lent the money to a bank at interest for his own and the bank's use. This was a breach of trust which the statute plainly prohibits.

As to the case of Huling, the charge in the indictment is that he unlawfully and wilfully aided and abetted the defendant state treasurer in the doing of the acts which are charged against the latter in the indictment.

There is no allegation that any act done by Huling in aiding and abetting the defendant Cameron was done with knowledge of the source of the funds deposited nor of their ownership. There is no allegation from which the law would raise a presumption of such knowledge. Huling sustained no official relationship to the funds. He had no official duty to perform with reference to them. The offense defined by the statute on which the indictment is based being one that arises out of the acts of an official who held the funds as such official, in order that one who held no such official connection with the funds can be held as an aider or abettor of such official, it is essential that he have knowledge of the character of the funds unlawfully dealt with.

Guilty knowledge is an essential ingredient of crime. *Birney v. The State*, 8 Ohio, 230; *Kilbourne v. The State*, 84 Ohio St., 247, 253, *et seq.*

The instances in which it is not necessary to affirmatively aver such knowledge are those in which the declared purpose of the statute discloses the legislative intent to the contrary, as in the case of the sale of adulterated food.

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The exceptions as to Cameron, defendant, are sustained, and as to Huling are overruled.

NICHOLS, C. J., JOHNSON, WANAMAKER and WILKIN, JJ., concur as to Cameron, and SHAUCK, JOHNSON, NEWMAN and WILKIN, JJ., concur as to Huling. DONAHUE, J., concurs in the judgment overruling the exceptions as to Huling.

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THE STATE, EX REL. SCOTT, v. SWAN ET AL., DEPUTY STATE SUPERVISORS OF ELECTIONS.

*Elections—Objections to nominations—Court will not require board of elections—To hear and determine objections, when.*

A court will not compel a board of deputy state supervisors of elections to hear and determine objections to nominations of candidates for office, filed fifty-five days after the primary election and after the time in which the state supervisor of elections is directed by statute to certify the names of candidates with form of ballot to the board of deputy state supervisors of elections of the several counties of the state.

(No. 14759—Decided October 22, 1914.)

IN MANDAMUS.

On the 20th of October, 1914, the relator, L. H. Scott, filed a petition in this court, praying that a peremptory writ of mandamus issue, commanding defendants as deputy state supervisors of elections in and for Harrison county, Ohio, to recount and recanvass the ballots cast August 11, 1914, for the nomination of the Republican candidate for representative in the general assembly of the state of

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Ohio. The petition avers, among other things, that he was duly certified by petition as candidate at the Republican primary held in said county on August 11, 1914, for that office; that one Rupert R. Beetham was declared by the deputy state supervisors of elections to have been nominated at said primary; that on the 5th day of October, 1914, the relator filed with the deputy state supervisors of elections of Harrison county, Ohio, a protest against and objection to the announcement of the nomination of Rupert R. Beetham, for the reason that the votes for said nomination were not properly counted and that the canvass made by the precinct judges did not correctly state the result of the primary election; and that if the votes had been truly counted and correct returns made, it would be shown that relator received the largest number of votes for nomination to that office. He further avers that seven or more ballots in the Green township precinct were illegally counted for Rupert R. Beetham, the opposing candidate having the highest number of votes next to relator; that one or more ballots were illegally cast in Georgetown precinct and counted for Beetham, who, in the final result of the canvass, had a majority of but three votes. Relator further avers that he requested the deputy state supervisors of elections to open the ballot box wherein the votes of said precinct were deposited and to recount them in the manner provided by law; that the deputy state supervisors of elections considered said objection and protest, and being unable to arrive at a decision the matter in controversy was submitted to Hon. Charles H.

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Graves, as state supervisor of elections, who considered the question, summarily decided the same, and ordered the deputy state supervisors of elections to make a recount of all the ballots, determine the correct result of the vote for this office and place upon the ballot at the November election the name of the candidate found to have received the greatest number of votes; that the deputy state supervisors of elections prepared to follow the instructions and order of the state supervisor of elections, but before they could complete the work in this regard a temporary restraining order was granted by the common pleas court of Harrison county, restraining them from making such count as ordered by the state supervisor of elections, and subsequently this temporary restraining order was made permanent; that the deputy state supervisors of elections refused to recount the votes because of this permanent injunction by the common pleas court of Harrison county, Ohio, and for no other reason. The defendants entered their voluntary appearance to this action and waived the issuance of an alternative writ of mandamus, and thereupon filed a general demurrer to the petition.

*Mr. T. S. Hogan*, attorney general, and *Mr. J. I. Boulger*, for relator.

*Mr. C. W. Pettay* and *Mr. B. W. Rowland*, for defendants.

DONAHUE, J. The question here involved is one arising in the course of the nomination of candidates for county offices, which, under the provisions



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of Section 5006, General Code, comes within the jurisdiction of the board of deputy state supervisors of elections of Harrison county. Where the jurisdiction of the board of deputy state supervisors of elections or of the state supervisor of elections has been properly invoked by timely objections, courts have no power to interfere by injunction to prevent the carrying into effect the final judgment of the state supervisor or the deputy state supervisors of elections, but the carrying of this decision into effect by the proper officers then becomes an official duty imposed by law, which may be enforced in the courts of this state by mandamus. *Chapman v. Miller et al.*, 52 Ohio St., 166.

There is some confusion in the statutes as to when objections or other questions arising in the course of nomination of candidates shall be made. Section 5005, General Code, provides that objections in writing to certificates of nomination and nomination papers must be made within five days after the filing thereof. That section was enacted by the legislature prior to the adoption of the amendment to the constitution of the state requiring all nominations for elective, state, district, county and municipal offices to be made at direct primary election or by petition as provided by law. Section 4992, General Code, as it then read, authorized the nomination of candidates for public office to be made by a convention, caucus, meeting of qualified electors, primary election by such electors or the central or executive committee representing a political party, which at the next preceding election for state officers polled at least one per cent.

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of the entire vote cast in the state, and further provided that "The nominations so made to be valid must be filed as hereinafter provided." The next section (Section 4993) and subsequent sections in that chapter provide what these certificates of nomination shall contain, and further provide for the nomination of candidates for certain public offices by nomination papers signed by a designated number of electors.

Original Section 5004 provided when and with whom these certificates of nomination and nomination papers of candidates should be filed. Section 4992, General Code, was amended April 10, 1913, to conform to the constitutional amendment requiring all nominations to be by direct primary election or by petition as provided by law, so that this section and the subsequent sections of that chapter deal only with nominations by petition. Nominations by direct primaries are controlled by Sections 4949 to 4991-1, inclusive, as amended April 17, 1913 (103 O. L., 476-487).

On the 2d day of February, 1914, the general assembly of Ohio amended Section 5004, General Code, but retained the words "certificates of nomination." It is clear that this section can have no application whatever to nominations made by direct primary elections, for that is fully provided for in Chapter 6 of Title 14, Part First, General Code, being Sections 4949 to 4991-1, inclusive, as amended April 17, 1913 (103 O. L., 476). Section 5005, General Code, relates solely to the certificates of nomination and nomination papers filed

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under the provisions of Section 5004. If the former section has no application to candidates nominated at direct primary elections, it follows that Section 5005 does not limit the time in which objections may be filed in writing to the nomination of candidates nominated at such primary election.

It is insisted by the relator that Section 5090, General Code, applies to both primary and general elections. This section requires that all ballots counted by the judges and clerks of elections at a general election shall be carefully preserved for thirty days, and at the expiration of that time destroyed, unless a contest of election is then pending. In such case they shall not be destroyed until the contest is finally determined. In this particular case the ballots cast at this primary election were preserved in the manner and for the length of time required by Section 5090, General Code. It was also conceded in the argument of this case that these ballots have not yet been destroyed. Whether Section 5090, General Code, has any application to primary elections is in nowise important in this case. It appears from the petition that no written objections were filed by the relator with the board of deputy state supervisors until fifty-five days after the primary election was held, and this was less than forty days before the next general election. We are not disposed to hold, at this time, that the board of deputy state supervisors of elections has no jurisdiction whatever to hear and determine objections filed or questions raised in the course of the nomination of candidates for public

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office filed less than forty days before the next general election. It is sufficient to say that a court will not compel it by peremptory writ of mandamus to consider and determine objections filed or questions raised after the time the statutes of the state direct the state supervisor of elections to certify the names of candidates and form of ballots to the board of deputy state supervisors of elections of the several counties of the state.

It is averred in the petition that the board of deputy state supervisors of elections considered the objections filed with it, and being unable to arrive at a decision, submitted the question in controversy to the state supervisor of elections, who summarily decided the question. It is insisted, however, on the part of the defendant, that these objections were never submitted to the state supervisor of elections, and by agreement of counsel the letter written on behalf of the board of deputy state supervisors of elections directed to the secretary of state and his reply to this letter, are submitted to this court with the request that that question be determined now, although it is not raised by the demurrer to the petition but would be raised immediately by an answer if the demurrer to the petition should be overruled. In view of the urgent necessity for an early disposition of this case the court has considered this question so presented by agreement of counsel.

It is apparent from the letters submitted to this court that the jurisdiction of the state supervisor of elections was never properly invoked, and that

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he did not decide or attempt to decide the controversy. Objections filed by relator challenge the correctness of the count of the ballots cast in certain precincts in that county at the primary election for Republican candidate for representative to the general assembly of Ohio. The determination of this question determines who is legally nominated for this office by the Republicans of that county. The question of the duty of the board in reference to these objections is merely preliminary to the determination of the real question presented by the objections.

The board of deputy state supervisors caused a letter to be written to the secretary of state requesting advice in reference to its duties in the premises. This letter in this respect is as follows: "Kindly advise us what to do in the case, as we are not sufficiently versed in the law to act on our own judgment." The state supervisor of elections, on receipt of this letter, did not determine the controversy in any particular whatever, but immediately wrote to the deputy state supervisors of elections of Harrison county directing their attention to that portion of Section 5006, General Code, which requires it to decide the objections, and further advised that in order to decide these objections it would be necessary to recount the ballots cast at the primary election. If the state supervisor of elections had understood and believed that the objections had been referred to him for decision for the reason that the board of deputy state supervisors could not agree or could not arrive at any

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decision in reference thereto, he probably would have proceeded to decide the controversy, and that would have been the end of it. If he had decided the question it would have been folly to instruct the board of deputy state supervisors to decide the same controversy, for the jurisdiction of the state supervisor of elections could not attach until the jurisdiction of the board of deputy state supervisors ended. However that may be, the state supervisor of elections is not here seeking to enforce any order or judgment made by him in reference to this controversy. Nor is the board of deputy state supervisors of elections here asking that it be relieved from obeying the injunction granted by the common pleas court and be permitted to carry into effect the judgment it arrived at in reference thereto.

This action is brought by the relator against the board of deputy state supervisors of elections in his own behalf and in his own private interest. Had the relator been vigilant in the assertion of his own rights, this court would be equally vigilant in compelling by mandamus the election officers to do and perform any official duty clearly imposed upon them by law.

*Writ refused.*

NICHOLS, C. J., SHAUCK, JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

## Opinion of the Court.

THE STATE, EX REL. THE LONDON WATERWORKS  
CO., v. BURRIS, TREASURER.

*Municipal corporations—Ordinance granting franchise for furnishing water supply—Section 3982, General Code—Public utility rates—Section 614-44, General Code—Referendum—Section 4227-2, General Code—Municipality liable, when.*

(No. 14756—Decided October 22, 1914.)

IN MANDAMUS.

*Messrs. Murray & Emery*, for relator.

*Messrs. Crabbe & Johnson*, for respondent.

BY THE COURT. This is a proceeding in mandamus instituted in this court.

The relator, a corporation organized under the laws of Ohio, is a company for supplying water for public and private consumption and is and has been for a number of years established in the village of London.

On or before February 7, 1913, the council of said village by ordinance duly passed fixed and regulated the price for the period of seven and one-half years which relator might charge, collect and receive from said village for maintaining its fire hydrants and furnishing water for fire protection, as well as fixing and regulating the price it might charge to private consumers in said village for water furnished to them. This ordinance provided among other things that the relator might charge and receive from said village for the maintenance and use of one hundred and twenty-two hydrants,

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and for furnishing water for fire protection, \$4,270 per annum, payable in quarterly installments of one-fourth thereof, and for each additional hydrant over one hundred and twenty-two hydrants, which might thereafter be installed, \$35 per annum, one-fourth thereof payable at the end of each quarter.

On or about April 12, 1913, the relator accepted the terms of said ordinance and assumed the obligations thereunder. After the acceptance of the terms and provisions of the ordinance, the relator filed with the then public service commission of Ohio a copy of the schedule of its rates and prices as fixed by said ordinance, and no complaint was filed with said commission by said village or any officer or citizen thereof.

On the . . . . day of September, 1914, the relator presented to the council of said village, at its regular meeting, a bill for its services in maintaining said fire hydrants and furnishing water for fire protection for the quarter of a year, amounting to \$1,067.50, which was allowed by the council and the same ordered to be paid, and the clerk of the village thereupon issued his warrant upon the treasurer for said sum of \$1,067.50, which warrant, properly endorsed by relator, was presented to defendant, Orville C. Burris, treasurer of said village, for payment, which defendant refused and still refuses to make, although there were at that time and still are sufficient funds in his hands to the credit of the fund upon which said warrant is drawn and not appropriated to any other use or purpose to pay the same.



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The relator asks that a peremptory writ be issued by order of this court commanding the defendant to pay said warrant and for such other relief as in justice and equity he may be found entitled.

The respondent filed an answer in which he averred that none of the provisions of the ordinance of February 7, 1913, was submitted to a vote of the electors of the village of London, it being his contention that the provisions of the ordinance are not binding upon the municipal corporation because the same have not been ratified by a vote of the electors thereof.

Under the provisions of Section 3982, General Code, the council of a municipality in which there is established a company for supplying water for public and private consumption, may regulate from time to time the price such company may charge for water for public or private consumption or for fire protection.

Section 614-44, General Code, authorizes a municipal corporation in which a public utility is established, at any time prescribed by law, to fix by ordinance the price, rate, charge, toll or rental that such public utility may charge, demand, exact or collect therefor for an ensuing period, as provided in Section 3982, General Code.

The council of the village of London was therefore authorized to pass the ordinance of February 7, 1913, subject to the approval or rejection thereof by the qualified electors of the village, in the manner prescribed by Section 4227-2, General Code. The referendum was not invoked by the electors of the village in this case nor was any complaint filed

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with the public service commission of Ohio under Section 614-44. The relator accepted the rates and prices fixed by the ordinance of the council of the village, and the referendum not having been invoked and no complaint having been filed with the public service commission, the same became operative and binding.

It appears from the petition that the relator maintained the fire hydrants and furnished water for fire protection to the village of London for the quarter of year under the requirements of said ordinance, and a bill for such services was presented and allowed by council and ordered to be paid. The clerk of the village issued his warrant, and there was and is in the hands of the treasurer of the village sufficient funds to the credit of the fund upon which said warrant is drawn and not appropriated to any other use or purpose to pay the same. The warrant having been properly endorsed and presented by the relator, it was the duty of the defendant to pay the same.

*Peremptory writ allowed.*

NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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PORTER ET AL., TRUSTEES, *v.* HOPKINS, TREAS.,  
ET AL.

BOARD OF EDUCATION *v.* HOPKINS, TREAS., ET AL.

THE STATE, EX REL. POGUE, PROS. ATTY., *v.*  
HOPKINS, TREAS., ET AL.

THE CITY OF CINCINNATI *v.* HOPKINS, TREAS.,  
ET AL.

*Constitutional law—Workmen's compensation act—Sections 1465-62 to 1465-67, General Code (103 O. L., 72)—State, county, city and township employees.*

The provisions of Sections 15 to 20 of the act passed February 26, 1913, known as the workmen's compensation law (103 O. L., 72), constitute a valid exercise of the legislative power not repugnant to the constitution or to any limitation contained therein.

(Nos. 14761, 14762, 14763 and 14764—Decided November 11, 1914.)

ERROR to the Court of Appeals of Hamilton county.

These proceedings were all brought in the court of common pleas of Hamilton county. Their object was to test the constitutionality of certain sections of the law known as the workmen's compensation act (103 O. L., 72).

The allegations in the petitions of the several cases are substantially the same. After alleging the corporate capacity of the plaintiffs and that the several defendants are the duly qualified and acting officials as stated, it is alleged that the said municipal corporation and the different political subdivi-

## Statement of the Case.

sions named in the different petitions had suffered a deduction of the various amounts named in the petitions from their taxes by the auditor of Hamilton county, for contribution to the state insurance fund, under the provisions of the act referred to, passed by the general assembly on the 26th of February, 1913, approved March 14, 1913, and filed in the office of the secretary of state on March 17, 1913; that said deduction resulted from the fact that on or about the 13th of March, 1914, the auditor of Hamilton county drew a warrant upon the treasurer of said county, payable to the state treasurer, for the respective premiums due the state from the county of Hamilton and the various political subdivisions named in the petition for payment into the state insurance fund; that these warrants were sent to the auditor of state and delivered by him to the treasurer of state, and that the auditor of Hamilton county has charged these amounts to the various political subdivisions named and deducted them from the taxes collected by the treasurer.

It is averred that neither the city nor the other subdivisions levied any taxes for payment into the state insurance fund, and that the plaintiffs were without authority of law to levy any taxes for such expenditure during the year 1914.

It is averred that the act referred to, as to Sections 16, 17, 18, 19 and 20 thereof, is unconstitutional and void, in violation of Section 5 of Article XII of the Constitution of Ohio, and in violation of Section 35 of Article II of the Constitution of Ohio, and that the warrant drawn by said county

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auditor on said county treasurer, payable to said state treasurer, under said Section 19, is void and of no effect whatsoever and is a diversion and misapplication of public funds; that the plaintiffs have demanded of the said county auditor that he issue his warrant to the treasurers for these respective amounts, which he has refused to do.

It is further averred that by reason of these unlawful acts irreparable injury will result to the several political subdivisions; that the plaintiffs are without other remedy at law; that unless enjoined by an order of the court the county treasurer will cash, pay and honor the said warrants, and said state treasurer will present and demand collection thereof, and said state auditor will credit the same, to the amount thereof alleged to be due from said several plaintiffs, to the state insurance fund and deliver the said warrants to said state treasurer for collection.

The prayer contained in the several petitions is that the treasurer of Hamilton county be enjoined from paying the warrants; that the state treasurer be enjoined from collecting them; that the state auditor be enjoined from delivering the warrants to the state treasurer and from crediting the state insurance fund with the respective amounts; that the state auditor and the state treasurer be required to deliver the warrants to the auditor of Hamilton county, and that the latter be required to cancel such warrants; that the court adjudge the same to be null and void, and for all other proper relief.

To these petitions the defendants below filed demurrers. These demurrers were sustained by the

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court of common pleas and the actions were dismissed. On appeal the court of appeals of Hamilton county also sustained the demurrers and dismissed the petitions. Error is prosecuted here to reverse the judgments below.

*Mr. Washington T. Porter; Mr. Walter M. Schoenle*, city solicitor; *Mr. Charles A. Groom*, assistant city solicitor; *Mr. Thomas L. Pogue*, prosecuting attorney, and *Mr. John V. Campbell* and *Mr. Carl M. Jacobs, Jr.*, assistant prosecuting attorneys, for plaintiffs in error.

*Mr. Timothy S. Hogan*, attorney general, and *Mr. James I. Boulger*, for defendants in error.

JOHNSON, J. Counsel for plaintiffs in error entertain the view that Sections 15 and 16 of the statute referred to are unconstitutional because they violate Section 35 of Article II and Section 5 of Article XII of the Constitution. Section 35 was adopted in September, 1912, and provides: "For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational diseases, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payments shall be made therefrom, and taking away any or all rights of action or defenses from employes and employers; but no right of action shall be taken away from

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any employe when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employes. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto."

The statute referred to was passed under the above provision of the constitution. By Section 13 it is provided that the following shall constitute employers subject to the provisions of the act: "1. The state and each county, city, township, incorporated village and school district therein. 2. Every person, firm, and private corporation including any public service corporation that has in service five or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express, or implied, oral or written." Section 14, subdivision 1, defines the terms "employe," "workman" and "operative" in the service of the state and its said subdivisions. Section 15 requires the state and its said subdivisions to contribute to the state insurance fund in proportion to the annual expenditure of money by each for the service of persons described in Section 14, and Section 16 provides that the amount to be so contributed by the state itself and its subdivisions shall be, unless otherwise provided by law, a sum equal to one per cent. of the amount expended by the state, and for

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each county, city, incorporated village, school district, or other taxing district respectively, during the next preceding fiscal year for the services of persons described in subdivision 1 of Section 14. The law requires all other persons and corporations subject to its operation to pay into the state insurance fund semi-annually the amount of premium determined and fixed by the state liability board of awards for the employment or occupation of such employer, and provides for the administration and distribution of the fund to persons killed or injured in occupations or to their dependents. Plaintiffs call our attention to the fact that the state and its political subdivisions are required by Section 16 to pay a fixed part (one per cent. of their payrolls), while all other persons or corporations subject to the provision of the law pay in accordance with the rate fixed by the board after classification of the employment involved and ascertainment of the degree of hazard.

It is contended, substantially, that the difference in the method, by which the amount to be paid by the state and its subdivisions is ascertained from that by which the amount to be paid by all other employers is ascertained, renders Sections 15 and 16 of the act unconstitutional. Plaintiffs argue that those sections provide for a discrimination which is unauthorized by Section 35, Article II of the Constitution.

It is to be observed that the act referred to is amendatory of the act of May 31, 1911 (102 O. L., 524). The latter statute provided for the creation of a state liability board of awards which should



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establish a state insurance fund from premiums paid by employers and employes in the manner provided in the act. It was a humanitarian measure, passed in response to a widespread public belief that the action for personal injuries, by the employe against employer, no longer furnished a real remedy, and that it did not meet the economic and social requirements which had resulted from modern industrialism.

This court in *State, ex rel., v. Creamer*, 85 Ohio St., 349, in upholding the constitutionality of that statute, pointed out that it was not compulsory or coercive, but that, while it did not compel the employer and employe to operate under its provisions, inducements were held out in the enactment to facilitate and make desirable its acceptance by both. The general scheme of the law and the provisions for the collection, control and disbursement by the state, of the insurance fund provided for by its terms, were sustained as a valid exercise of the police power by the legislature, as the depository of the legislative power of the state. After the enactment and the decision just referred to, Section 35, Article II, was adopted by the people as an amendment to the Constitution. The obvious purpose of the amendment was to empower the legislature to enlarge the scope of, and to fortify the purpose intended to be accomplished in, the original act. The section enables the legislature to pass laws "establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payments shall be made

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therefrom." It is manifest that the purpose was to leave no doubt as to the power of the legislature to pass a compulsory act providing for an insurance fund which should be contributed to by employers only. The section further provides that the laws so passed may provide for the taking away of any or all rights of action or defenses from employees and employers subject to certain conditions named. It is then provided that laws may be passed establishing a board which may be empowered to classify all occupations according to the degree of hazard, to fix rates of contribution to such fund according to such classification and to collect, administer and distribute such fund and determine all rights of claimants thereto.

It is argued that the employees of the state and its subdivisions are included in the occupations referred to in Section 35, and must be included within the provisions of any law with reference to their classification.

There are two complete sentences in Section 35 and each confers authority to prescribe a complete plan. The first authorizes the establishment of the state insurance fund and the determination of the terms and conditions on which payments shall be made therefrom. The second permits the classification of occupations and the distribution of the fund. The state and its subdivisions and public employees are entirely distinct from employers and employees engaged in private business occupations. It may well be doubted whether the term "occupation" can be properly applied to the duties of one

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in the service of the state. The state and its subdivisions are not engaged in an occupation in the usual acceptation of that term. The political subdivisions of the state are merely instrumentalities to carry out the purposes of government, and their liabilities are entirely different in their nature and scope from those of employers in private business. Those liabilities are, very largely, purely statutory. It is to be noted that the statute in question in this case was not enacted to enlarge liability, but to provide compensation for injuries to employes without reference to any legal liability, "provided the same was not purposely self-inflicted." It is apparent that the general assembly regarded the state, its subdivisions and employes in the separate and distinct respects above indicated. Section 20 of the law provides that the board shall keep a separate account of the money paid into the state insurance fund by the state and its subdivisions and the disbursements therefrom on account of injuries to public employes. The board is further required by Section 17 to communicate to the general assembly on the first day of each regular session an estimate of the amount necessary to be contributed to the fund by the state during the next two years. These provisions are obviously for the purpose of enabling the legislature to provide such an insurance fund for the employes of the state and its subdivisions as would be sufficient to maintain the separate account above indicated. We think it clear that there has been no conflict raised between the sections of the statute named and the constitutional provision quoted. The maintenance and conduct

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of an insurance fund by the state for the purposes above described would also be sustained as a valid exercise of the police power. *State, ex rel., v. Creamer, supra*. Nor do we find that this statute offends Section 26 of Article II of the Constitution. It is uniform in its operation throughout the state. It brings within its terms all employers and employes within its reason and operates equally upon all.

The authorities agree that a statute is general and uniform if it operates equally upon every person and locality within the circumstances covered by the act, and when a classification has a reasonable basis it is not invalid merely because not made with exactness or because in practice it may result in some inequality. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S., 61; *City of Cincinnati v. Steinkamp, Trustee*, 54 Ohio St., 284, 295; *State, ex rel., v. Creamer*, 85 Ohio St., 349, 405.

It is further contended that by this statute the public funds are diverted from the purpose for which they were levied and collected, in contravention of Section 5 of Article XII of the Constitution, which provides that no tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied. The case of *State, ex rel., v. Edmondson*, 89 Ohio St., 351, is cited in support of this view. In that case the law of April 2, 1908, provided for the creation of a fund by each county for the relief of its own blind. The blind fund of each of the several counties was created by levy expressly provided for by the stat-

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ute, which distinctly stated "the object of the same." Section 8 of the law of 1913 on the same subject required the treasurers of the different counties to transfer to the state treasurer all moneys in their possession, or that might come into their possession, under the law of 1908, and the law of 1913 provided for the use and distribution of these moneys as part of a fund to be expended for the purposes of the entire state. It was held that this diversion of the taxes levied by the different counties pursuant to law was a violation of the provisions of the constitution quoted above.

No such invalidity exists in the act we have under examination. It fixes a certain charge or debt which is to be paid by the several subdivisions named, the amount of which is to be deducted from the taxes collected before they are distributed by the proper ministerial officers. The maintenance of contingent and general funds for general purposes is provided for by statutes which are familiar. The municipal and other subdivisions are fully empowered to raise such funds. It would be wholly impracticable to specifically name in the different budgets the amount to be raised for each specific item. There are many incidental charges which are necessarily taken care of out of the funds of the character referred to as the needs arise. The fact that the amount raised does not meet the exact requirements from time to time and that some inconvenience may arise does not affect the validity of the statutory requirements. These provisions and the procedure required to be followed pursuant thereto are fully detailed in the briefs of coun-

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sei. It was the duty of the taxing officers of the different subdivisions to provide for such general and contingent funds in accordance with the provisions of the law. *Commrs. of Champaign County v. Church, etc., Admr.*, 62 Ohio St., 318; *Board of Health v. Greenville*, 86 Ohio St., 1; *Briswell et al. v. State, ex rel.*, 87 Ohio St., 154, 168.

Finding no error in the record the judgments below are affirmed.

*Judgments affirmed.*

NICHOLS, C. J., DONAHUE, WANAMAKER, NEWMAN and WILKIN. JJ., concur.

## THE STATE, EX REL. JEWETT, v. SAYRE, AUDITOR.

*County commissioners—May compound or release—Claim for breach of road contract—Section 2416, General Code—Pro tanto pay upon abandonment of road improvement—May be allowed or rejected, when—Contract of settlement irrevocable, when—Cannot be rescinded by resolution, when.*

1. The claim of a county for damages against a contractor for breach of contract for a road improvement is a debt due the county within the meaning of Section 2416, General Code, which the board of county commissioners may compound or release in whole or in part.
2. Where a contractor wholly abandons a contract for a road improvement upon the claim that the contract is impossible of performance by reason of the nonexistence of the material required by the contract and demands pay *pro tanto* for the value of the material furnished and labor performed in part performance of the contract before discovering that the contract is impossible of performance, such a demand may be the subject of a legal claim against the county which the board of

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county commissioners has the authority to pass upon and allow or reject in whole or in part.

3. Where there is a debt due the county that the board of county commissioners under authority conferred by Section 2416, General Code, may compound or release in whole or in part, and the debtor in good faith is making a claim against the county that the board of county commissioners has the right and authority to allow or reject in whole or in part, a contract made and entered into by the board of commissioners with the debtor by which the debtor is released from the payment of all or part of the debt due the county in consideration of his releasing the county from liability for all or part of his claim against the county, is binding upon the county and the debtor alike, and neither can be released from the terms of such contract of settlement without the consent of the other contracting party.
4. A resolution adopted by the board of county commissioners subsequently to the making of such a contract of settlement, and without the consent of the other contracting party, purporting to set aside and rescind the contract of settlement theretofore made and entered into does not effect a rescission of the contract.

(No. 14651—Decided November 17, 1914.)

## IN MANDAMUS.

On the 14th day of May, 1913, W. O. Jewett entered into a contract with the county commissioners of Franklin county, Ohio, to furnish material and perform all work and labor necessary to build and complete the Boehm road in a good and workmanlike manner, from the Sunbury pike easterly to Harlem road, thence southward to C. Harbarger road, thence east to Central Village road, in Blendon and Plain townships, all materials to be furnished and work done according to plans and specifications, which were made a part of the contract,

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and to be completed by the 31st day of December, A. D. 1913, for which material and labor the county commissioners of Franklin county agreed to pay to W. O. Jewett certain specified prices for excavation and materials aggregating the sum of \$40,-566.05. This compensation was to be paid from time to time upon estimates, the county commissioners to retain 10 per cent. of the contract price until the final completion of the work.

On the 17th day of May, 1913, a bond in the sum of \$20,285, conditioned for the faithful performance of this contract, was executed by W. O. Jewett, with two sureties, and delivered to the county commissioners. The plans and specifications made a part of this contract provided among other things that "The first layer shall consist of crushed sandstone obtained from quarries to be secured and developed by the contractor herein. The quality of the local sandstone shall be approved by the engineer before being placed on the road."

The contractor entered upon the performance of this contract and constructed part of the road improvement in accordance with the plans and specifications attached to the contract and made a part thereof, and then abandoned the contract, notified the commissioners that he had abandoned all efforts to complete the same, assigning as a reason for such abandonment that the contract was impossible of performance because the material required by the terms of the contract, to be used in making this improvement, did not exist in sufficient quantity to complete the same, and demanded from the county commissioners pay *pro*



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*tanto* for the material furnished and labor performed in part performance of the contract before discovering that the same was impossible of complete performance.

On the 20th day of May, 1914, this claim of the contractor was presented to the board of county commissioners, who, upon examination and consideration thereof, found as a fact and declared by resolution that the materials specified in the plans and specifications for said road improvement could not be obtained in such quantity and quality as required in the plans and specifications, and, thereupon, by resolution, entered into a contract of settlement with said contractor, by the terms of which the board of county commissioners ordered paid to W. O. Jewett out of the treasury of the county the sum of \$1,516.96, if he would accept the same in full satisfaction of his claim against the county for compensation *pro tanto* for that part of the material furnished and work already performed and release the county from all other claims for and on account of this material furnished and labor performed; and thereupon the said W. O. Jewett consented in writing to the terms and conditions imposed by this resolution, and did then and there release the county from all further payment or liability to him by reason of the material furnished and labor performed in part performance of the contract before the discovery that complete performance was impossible; and thereupon, upon the consent in writing of the contractor to the terms of the proposition contained in the resolution and the

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release in writing by the contractor of the county from all further claims and liability under this contract, the county commissioners directed the payment to the contractor the said sum of \$1,516.96, ordered and directed the county engineer to revise all the plans and specifications for the improvement of this road and directed the clerk of the board of county commissioners to advertise according to law for bids for the completion of this improvement. The county auditor refused to issue a warrant to W. O. Jewett in compliance with the order of the commissioners for the sum of \$1,516.96, or any other sum, and thereupon Jewett as relator filed in this court a petition in mandamus to compel the auditor of Franklin county to issue his warrant to him for the payment of \$1,516.96.

To the petition of the relator the defendant, auditor of Franklin county, filed an answer, admitting the adoption of the resolution by the board of county commissioners purporting to authorize payment to the relator of \$1,516.96 in full satisfaction and liquidation of all claims against the county for material furnished and labor performed by Jewett on this road improvement, and averring among other things that after the relator entered into the performance of the work he discovered he had bid too low for sandstone and endeavored to get limestone substituted for sandstone and a higher price allowed therefor. Failing to secure the allowance of the higher price, relator discontinued work, after completing two miles of the first course of said road, and abandoned said work, and has done

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nothing since in connection therewith except his efforts to induce the board of county commissioners to release him from this contract. The defendant also avers that the resolution adopted by the board of county commissioners is false in this, to-wit: "That there is, and always has been a sufficient quantity of local sandstone of such quality as will meet the approval of the engineer and the said county commissioners, as required in said plans, and that it is now and always has been possible for the relator to develop quarries that will produce a sufficient quantity of sandstone of such quality as is required by said plans and specifications to build the first course of said road." The answer further avers that the county surveyor maintains that there is a sufficient quantity of local sandstone of acceptable quality to complete this work, and that on the 13th day of June, 1914, the board of county commissioners, at the instance of the prosecuting attorney, made further investigation and passed another and second resolution in which it declared that it erred in its judgment expressed in the resolution of May 20, 1914, and that it is now, at the date of the passing of this second resolution, of the opinion that sufficient stone of the proper quality can be procured in this county, and thereupon proceeded to rescind and declare null and void the former resolution.

To this answer the relator filed a general demurrer, and the cause is submitted to this court upon this demurrer to the answer of the defendant, Sayre, auditor of Franklin county.

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*Messrs. Wilson & Rector*, for relator.

*Mr. Edward C. Turner*, prosecuting attorney,  
and *Mr. Herbert C. Sherman*, assistant prosecuting  
attorney, for respondent.

DONAHUE, J. It is clear that the answer of the defendant to the petition of the relator states no defense. The averments in the answer that other officers of the county had reached a different conclusion as to the existence or nonexistence of the material specified in the contract is certainly of no importance, as these officers are not charged with any discretion in relation to this contract, and their opinion, one way or the other, cannot affect it. It is also equally clear that the second resolution, adopted *ex parte* by the board of county commissioners almost a month later than the resolution to pay the contractor a sum certain in consideration of the material furnished and work already performed, and in further consideration of the release by the contractor of all further claim against the county arising under this contract, can not avoid the original contract of settlement nor prejudice the right of the contractor to receive the amount agreed to be paid him in settlement of all his claims against the county. Nor is the averment in this answer that material existed in Franklin county sufficient for the purpose of the contract of any importance at this time. That was a matter to be determined before or at the time the agreement to settle the controversy between the contractor and the commissioners was made and entered

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into by the parties to that contract; and, in the absence of an averment that the commissioners acted fraudulently or in collusion with the contractor, or that the contractor made false and fraudulent representations to the commissioners, knowing them to be false and fraudulent, and that the commissioners relied, and had a right to rely, upon such representations, the judgment of the commissioners upon that question is final and the contract of settlement then entered into binding upon all parties thereto.

This demurrer, however, searches the record, and presents for our consideration the sufficiency of relator's petition. The question of the sufficiency of the petition depends upon the question of the authority of the commissioners to settle and adjust the conflicting claims of the county and the contractor and to order payment to the contractor of a sum of money and release him from all claim for damages for breach of contract in consideration of the release by him of all other and further claims against the county for material furnished and labor performed.

At the time this first resolution was adopted by the commissioners the contractor had completed about two miles of the improvement. The value of the material furnished or labor performed in making this improvement is not averred either in the petition or answer, nor does it appear whether any payments had been made to him on account of this material and labor, although the contract provides that the commissioners should pay him from time to time upon estimates, reserving 10 per cent. of the

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original contract price. The pleadings do show, however, that about two miles of the improvement had been completed and that the contractor was making claim for payment for that work *pro tanto*, and insisting that substantial performance of the entire contract was impossible by reason of the non-existence in Franklin county of the material specified in the contract. In other words, he was asserting a claim against the county and contending that by reason of the impossibility of performance he was not only released from fully performing and therefore not liable in damages to the county for failure to perform, but that he was entitled to receive the full contract price *pro tanto* for the material furnished and labor performed prior to the discovery that complete performance of the contract was impossible. There had also arisen in favor of the county a claim for damages for breach of the contract, for it appears from these pleadings that the contractor had wholly abandoned his contract and refused and was still refusing to make any further attempt to perform, basing his refusal upon the claim that it was impossible of performance.

It can hardly be doubted that the board of county commissioners had the authority to determine the amount due the contractor for material furnished and labor performed, and to order payment to him of that amount or any less sum that the board might order paid in settlement of the claim. The board of county commissioners also had authority, under the provisions of Section 2416, General Code, to compound or to release in whole or in part the

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claim of the county against the contractor for damages for breach of the contract. Undoubtedly this claim was a debt within the meaning of that section. In the case of *Peter v. Parkinson, Treas.*, 83 Ohio St., 36, this court held that a personal tax which stands charged upon the duplicate is not a debt within the meaning of this section, for the reason that "a tax is an impost levied by authority of government, upon its citizens or subjects, for the support of the state. It is not founded on contract or agreement." The reason given by this court in that case why a tax is not a debt within the contemplation of this statute clearly shows that this claim for damages for breach of contract is a debt due the county which the commissioners may compound or release in whole or in part. In the case of *Jones, Auditor, v. Commissioners*, 57 Ohio St., 189, it was held by this court that the board of county commissioners "may pass upon and adjudicate claims against the county for services in a matter, which, under the statutes, may be the subject of a legal claim against the county. But it is without jurisdiction to entertain or adjudicate claims which in themselves are wholly illegal and of such a nature as not to form the subject of a valid claim for any amount." To the same effect is the case of *Shepard v. Commissioners*, 8 Ohio St., 354; *Carder v. Commissioners*, 16 Ohio St., 353. This claim of the contractor for compensation for material and labor in part performance of this contract was the subject of a legal claim against the county, and that being true the commissioners were acting within the scope of their

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authority when they allowed and ordered paid to him all or part of the amount claimed; and, in the absence of fraud or collusion, courts have no authority to substitute their opinion and discretion for the opinion and discretion of a board clothed with authority by law to determine the question in controversy.

It is true that the contractor is not excused from substantial performance of his contract merely because performance may be difficult, dangerous or burdensome. Nor does the mere impossibility of performance necessarily relieve the promisor from the payment of damages for failure to perform, unless the contract itself contains a provision, express or implied, releasing him from damages in case the contract becomes impossible of performance. There is, however, a conflict of authority upon this subject, but the great weight of authority seems to support the rule stated in 3 Elliott on Contracts, Section 1891: "Where no express or implied provision as to the event of impossibility can be found in the terms or circumstances of the agreement, it is a general rule of construction \* \* \* that the promisor remains responsible for damages, notwithstanding the supervening impossibility or hardship. It must be borne in mind, however, that it is equally well settled that when performance depends upon the *existence of a given person, purpose or thing* and such existence or continued existence was the assumed basis of the agreement, the death of the person or the destruction or *non-existence of the thing* without fault puts an end to the obligation."



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In this particular case the contractor claimed that the material specified in the contract for this road improvement did not exist in sufficient quantities to complete the improvement. The specifications attached to and made a part of the contract provided for the use of crushed local sandstone of quality to be approved by the engineer before being placed on the road. The commissioners, upon investigation of the claim made by the contractor, that this stone did not exist in sufficient quantities of a quality that would meet the approval of the engineer, found and declared by resolution that the claim of the contractor in that behalf was true, and, so far as these pleadings are concerned, this finding is not attacked for any reason, except for error of judgment on the part of the commissioners in arriving at this conclusion. We are not now concerned with this question of fact. The commissioners, in the honest belief that this resolution stated the truth, undertook to adjust the respective rights of county and contractor. They could have refused payment for any part of the work performed and brought an action for damages. On the other hand, if this claim of the contractor was true, as they then believed and declared in this resolution, they might not only fail to recover any damages whatever but might also be compelled to pay the full contract value *pro tanto* of the work completed. *Heine v. Meyer*, 61 N. Y., 171; *Jones v. Judd*, 4 N. Y., 411; 3 Elliott on Contracts, Section 1902.

Acting upon the facts as they then appeared to them, the board of county commissioners proceeded

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to and did allow to the contractor an amount in money which was evidently only part of the contractor's claim, and required him to release all other and further claims against the county under and by virtue of this contract. It is also fair to presume, from the facts pleaded, that the claim of the county for damages was taken into consideration and that the amount that would otherwise have been allowed to the contractor was materially reduced by this consideration. The contractor thereupon accepted in writing the offer of compromise tendered him by this resolution of the commissioners and the commissioners ordered paid to him the sum of \$1,516.96. This was a contract of settlement of the conflicting claims of the contractor against the county and of the county against the contractor, the adjudication of which claims clearly comes within the scope of the statutory authority of the commissioners, and, having exercised that authority and entered into this contract of settlement, it is just as binding upon the county as any other lawful contract the board of county commissioners could make, and that board, without the consent of the other contracting party, could not rescind its action and annul this contract of settlement. It is said, however, that the county commissioners have no statutory authority to rescind the original contract, made and entered into with this contractor on behalf of the county for this improvement. The discussion of that question here would be idle, for the reason that the contractor had then abandoned his contract and notified the

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commissioners that he would make no further efforts to complete the same. Right or wrong, the contractor refused to comply further with the terms of this contract. It was not then a question of rescinding the contract, although in fact the resolution did purport to rescind it. The only thing for the commissioners to do was to proceed as in all other cases of breach of contract, readvertise and let the contract for the completion of this work to the lowest bidder, and then bring an action against the contractor and his bondsmen for damages for breach of contract, or if, in the opinion of the commissioners, as expressed in this resolution, they would probably fail in a suit to recover damages for breach of contract and possibly be compelled to pay the value *pro tanto* for material and labor furnished and performed, they have the right and authority under Section 2416, General Code, to compound this debt or release it in whole or in part.

For these reasons the relator is entitled to a peremptory writ as prayed for in his petition.

*Peremptory writ allowed.*

NICHOLS, C. J., SHAUCK, NEWMAN and WILKIN, JJ., concur.

Statement of the Case.

THE STATE, EX REL. KLORER, *v.* FIMPLE, JUDGE.

*Bill of exceptions—Mandamus to compel judge to sign and allow same—Trial by referee and report.*

Mandamus will not lie to compel a judge of the court of common pleas to sign and allow a bill of exceptions upon the overruling of exceptions to the report of a referee and the rendering of final judgment thereon, the referee having been appointed to determine the issues in the action and to report to the court all the testimony with his findings of fact and conclusions of law, and his report and the final judgment thereon showing his compliance with the order of his appointment. The record, without a bill, presents to the court of appeals all questions which were presented in the court of common pleas.

(No. 14734—Decided November 17, 1914.)

IN MANDAMUS.

Issues of fact were joined in the court of common pleas in an action in which the relatrix and The Steiner Coal Company were adversary parties. The court referred the case to a referee for trial by the following order: "On consent of all parties in the above-entitled action this cause is referred to James H. Robertson, who is appointed referee herein, and is directed to determine the issues herein, to take the testimony of witnesses in writing, and report such testimony and findings of fact and conclusions of law to this court without unnecessary delay." Pursuant to this order, the referee tried the case upon the evidence and announced his findings of fact and conclusions of law. Both the relatrix and the Steiner company filed motions for

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a new trial before the referee, which were overruled, she excepting. Exceptions were taken before the referee, but no bill of exceptions was tendered to him or signed by him. The referee then made his report pursuant to the order of court, reporting the testimony in full, together with his findings of fact and his conclusions of law. The relatrix filed exceptions in the court of common pleas to the referee's findings as to both law and fact, and the Steiner company filed a motion to confirm the report of the referee. In the court of common pleas, the defendant in this action sitting as judge thereof, the exceptions of the relatrix and the motion to confirm the report of the referee were heard, the exceptions were overruled and the motion to confirm was sustained "on the pleadings, report of the referee, James H. Robertson, and the evidence taken by said referee and filed by him in this cause in accordance with the former order of this court." And thereupon the court of common pleas rendered judgment in favor of the Steiner company and against the relatrix. She thereupon filed a motion for a new trial, which was overruled. She then tendered to the defendant for his signature and allowance a bill of exceptions embodying the report of the referee and reciting that all the evidence which it contained had been introduced into court by the parties for the determination of the issues joined in said case. By his endorsement thereon the defendant declined to sign and allow said bill of exceptions because he was without authority so to do. By her petition in the present case the relatrix seeks a peremptory writ of mandamus

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compelling the defendant to sign and allow the bill. The defendant answering sets out in detail the proceedings in the court of common pleas and before the referee and the substance of the report, which have already been given with sufficient definiteness in this statement. In his answer the defendant alleges his belief in the want of his authority to sign a bill of exceptions under the circumstances, and further alleges that he has no personal knowledge whatever of anything which transpired before the referee.

*Messrs. Pomerene, Ambler & Pomerene*, for relatrix.

*Messrs. Webber & Turner*, for respondent.

BY THE COURT. That the relatrix is entitled to a review in the court of appeals of the judgment of the court of common pleas in the cause in which she seeks the allowance and signing of this bill of exceptions is not questioned. The question is, Why is the bill necessary to such review, or in what manner would it facilitate it? The authority for the reference and the proceedings thereunder are found in Sections 11475 to 11486, General Code. Attention to the provisions of those sections would seem to determine some questions about which counsel apparently differ. The referee is authorized to summon and compel the attendance of witnesses, to administer oaths and grant adjournments, and it is then comprehensively enacted that "a trial by referees shall be conducted as if by the

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court." His decision may be excepted to and reviewed as in a trial by the court, and his decision stands as the action of the court, upon which judgment may be entered as if the court had tried the action, as was done in this instance. The only provision for a bill of exceptions in cases so tried is in Section 11484, General Code, that "The referees shall sign any true exceptions taken to an order or decision by them made in the case, and return it with their report to the court." This provision is obviously necessary to bring before the court questions arising before a referee who reports only his conclusions of fact and law, his conclusions of fact having the effect of a special verdict, for in such case without a bill signed by him neither the propriety of his procedure nor the correctness of his conclusions of fact could be determined by the court. But why a special bill of exceptions should be signed, even by the referee in a case referred, as was this, to take the testimony of witnesses in writing and report it with his findings of fact and conclusions of law, is not apparent. But no bill of exceptions was taken before the referee, before whom the case was tried as to the court, nor does any appear to have been tendered to him. The allowance and signing of the bill by the judge is sought in this action. The function of a bill of exceptions is to bring upon the record matters material to further judicial inquiry which would not otherwise appear. The trial judge here naturally and properly answers that he has no personal knowledge respecting the proceedings before the referee. For information upon that subject he was

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confined to the referee's report. That report was before him as the sole basis of his action in overruling exceptions and in rendering judgment. It is equally available to the court of appeals. It is to be observed that in this case the report of the referee was confirmed and judgment rendered upon it and upon it alone. There could, therefore, have been no evidence whatever before the court of common pleas that was not embraced in the report of the referee, already a part of the record. This bill of exceptions, if signed, would add nothing to the record for the information and action of the court of appeals. The writ of mandamus will not be issued to compel the doing of a vain thing.

*Petition dismissed.*

NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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McLARREN v. JOHNSON ET AL.

*Constitutional law—Conflict of judgment of court of appeals with circuit court—Writ of certiorari—Section 6, Article IV, Constitution (1912).*

(No. 14748—Decided November 17, 1914.)

ERROR to the Court of Appeals of Franklin county.

ON MOTION to dismiss.



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*Mr. H. H. McMahon*, for plaintiff in error.

*Mr. Charles T. Warner*, for defendants in error.

BY THE COURT. The provision in Section 6, Article IV of the Constitution of Ohio, as amended September 3, 1912, directing the judges of a court of appeals to certify the record of a case to the supreme court for review and final determination where they find that a judgment which they have agreed upon is in conflict with the judgment pronounced upon the same question by any other court of appeals of the state, does not authorize the judges of the court of appeals to certify the record of a case where they find that a judgment upon which they have agreed is in conflict with the judgment pronounced upon the same question by a circuit court.

While, under the amendments to the constitution, the courts of appeals are successors to the circuit courts of the state, yet they are not the same as the circuit courts. The amendments to the constitution create the courts of appeals, and the framers of the amendments to the constitution specifically designate that the judgment upon which one court of appeals has agreed must be in conflict with the judgment pronounced upon the same question by another *court of appeals*. Courts have no power or authority to extend the plain and positive provisions of this section to include circuit courts.

Aside from this consideration, however, it is apparent that the circuit courts were not intended to be included within this provision of the constitu-

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tion. The circuit courts, as they existed prior to the amendments to the constitution, did not have final jurisdiction. Any party to a suit aggrieved by the decision of the circuit court then had a right to prosecute error to the judgment of that court in the supreme court of this state. These judgments, therefore, were not judgments of a court of last resort and were binding only upon the parties to the suit and courts inferior thereto in that jurisdiction. Under the amendments to the constitution creating the court of appeals that court is vested with final jurisdiction in all cases, except cases involving questions arising under the constitution of the United States or of the state of Ohio, cases of felony, cases which originate in the court of appeals, and cases of public or great general interest, so that where the judgment of one court of appeals conflicts with that of another, it is necessary that the question involved should be submitted to the supreme court in order that the practice and the general interpretation of the laws of the state should be uniform throughout the state. No such necessity existed prior to the adoption of the amendments, and, therefore, judgments entered by the circuit courts of the state cannot be considered in determining the jurisdiction of this court under this provision of the constitution.

*Motion to dismiss sustained.*

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

## Statement of the Case.

## GUYTON v. THE EASTERN ELECTRIC CO.

*Unlawful combinations—Action under Section 6391, General Code—Counterclaim or set-off by defendant—Under Section 6397, General Code—Valentine anti-trust law.*

In an action on an account by a member of an unlawful combination under Section 6391, General Code, for goods sold the price of which is advanced as a result of the unlawful combination, a defendant injured in his business by reason of the advance in price of the goods purchased by him from such member, may set up by way of counterclaim or set-off the damages allowed by Section 6397, General Code.

(No. 13916—Decided November 24, 1914.)

ERROR to the Circuit Court of Montgomery county.

Defendant in error filed a petition in the court of common pleas of Montgomery county asking judgment against the plaintiff in error in the sum of \$189.99 on an account for lamps furnished plaintiff in error by defendant in error.

In the first defense in the amended answer and cross-petition of plaintiff in error, by way of cross-petition, it was alleged that defendant in error, during the time covered by the items in the account attached to the petition and for a long time prior thereto, was a member of a combination of manufacturers of electric lamps operated under the name and style of The National Electric Lamp Association, and that the association as constituted by

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defendant in error and others was a combination formed for the purpose of fixing at an enhanced figure the price of electric lamps as manufactured by the members of said combination among themselves by which dealers and consumers of said lamps should be compelled to purchase the same at such enhanced price and to destroy as between the members of said association all competition in price; that said association, since its formation by defendant in error and others, has so far advanced and maintained the price of lamps and has effected and perfected a monopoly of the sale and distribution of the same; that as a result of such combination the price of lamps to plaintiff in error and other consumers thereof was advanced to the extent of twenty-five per cent., and for a term of four years prior to the filing of said amended answer and cross-petition plaintiff in error had been compelled to purchase of the defendant in error lamps for his trade at such advanced figure, entailing upon plaintiff in error a heavy loss in trade and profit on account thereof; and that during said period plaintiff in error had purchased of defendant in error lamps at a cost aggregating approximately \$541.98, of which one-fifth, \$108.39 in cost, was due to the illegal combination and which was a damage to plaintiff in error.

It was further alleged that, in accordance with the act of the general assembly of the state of Ohio of April 19, 1898, recorded in volume 93, Ohio Laws, at page 146 (Section 6397, General Code), he was entitled to twofold the amount of damage sustained by him by reason of the premises.

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Plaintiff in error further averred that there was nothing due to defendant in error on the claim sued on and that he was entitled to recover from defendant in error damages in the sum of \$17.78.

In the third defense of the answer, by way of cross-petition, plaintiff in error adopted all the allegations of the first defense and averred further that the account sued upon in the petition was for a portion of the lamps purchased by plaintiff of the defendant subsequently to the advance in price due to said illegal combination. There was a prayer for judgment against the defendant in error in the sum of \$17.78.

To these two defenses, as well as to a second defense, a demurrer was filed by defendant in error upon the ground that facts sufficient to constitute a defense were not stated therein. This demurrer was sustained to each of the three defenses and cross-petition, and plaintiff in error not desiring to amend or plead further judgment was rendered against him in the sum of \$203.08, with interest from May 28, 1912, together with costs.

Error was prosecuted to the circuit court and the judgment of the court of common pleas affirmed.

Plaintiff in error makes no objection to the sustaining of the demurrer to the second defense, but asks for a reversal of the judgment of the circuit court upon the ground that that court erred in sustaining the demurrer to the first and third defenses and cross-petition.

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*Mr. Lee Warren James*, for plaintiff in error.

*Messrs. VanDeman, Burkhart & Smith*, for defendant in error.

NEWMAN, J. It appears from the allegations of the amended answer and cross-petition that defendant in error was a member of an unlawful combination, as defined by Section 6391 *et seq.*, General Code, known as the Valentine anti-trust law. No claim is made here that plaintiff in error can avoid payment of the account sued on upon the ground that defendant in error was a member of this unlawful combination, although this point was made in the lower courts. It is insisted, however, that plaintiff in error may set up by way of counter-claim the damages he sustained in the purchase of the lamps mentioned in the account sued on by reason of this unlawful combination and, by way of set-off, the damages he sustained during the four years in which he dealt with defendant in error.

Under the Valentine anti-trust law damages are allowed to a person injured in his business or property by reason of an unlawful combination, Section 6397 providing: "In addition to the civil and criminal penalties provided in this chapter, the person injured in his business or property by another person, or by a corporation, association or partnership, by reason of anything forbidden or declared to be unlawful in this chapter, may sue therefor in any court having jurisdiction thereof in the county where the defendant or his agent resides or is

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found, or where service may be obtained, without respect to the amount in controversy, and recover twofold the damages sustained by him and his costs of suit. When it appears to the court, before which a proceeding under this chapter is pending, that the ends of justice require other parties to be brought before such court, the court may cause them to be made parties defendant and summoned whether they reside in the county where such action is pending, or not."

The contention of counsel for defendant in error is that the action which this statute authorizes must be a direct one.

It appears from the answer and cross-petition that plaintiff in error was compelled to purchase from defendant in error, a member of the unlawful combination, lamps for his trade at an advanced figure, entailing upon him a heavy loss in trade and profit on account thereof, and that the account sued on is for a portion of the lamps so purchased by him, and a claim is made for damages under the provisions of the Valentine anti-trust law.

The question presented, then, is whether such a claim for damages is a counterclaim under Section 11317, General Code, where it is defined to be "a cause of action existing in favor of a defendant against a plaintiff or another defendant, or both, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action."

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The account sued on was for lamps purchased at the advanced price fixed by the unlawful combination. The sale of these lamps at this price gave rise to a cause of action in favor of plaintiff in error and was referable to the transaction had between the parties when the sale was made, and, in the language used in Section 11317, it was "connected with the subject of the action." As we view it, the claim of plaintiff in error answers the statutory requirement of a counterclaim and it was error to sustain the demurrer to the third defense.

As to the first defense, in which plaintiff in error alleges the existence of the unlawful combination—that by reason thereof the price of lamps to him was advanced and for a term of four years prior to the bringing of the action he was compelled to purchase of defendant in error lamps for his trade at such advanced figure, entailing upon him a heavy loss in trade and profit on account thereof, and that under the provisions of the Valentine anti-trust law he is entitled to twofold damages—the court of common pleas took the view that this claim for damages was upon a liability created by statute and therefore could not be pleaded as a set-off under Section 11319, General Code, which is as follows: "A set-off is a cause of action existing in favor of a defendant against a plaintiff between whom a several judgment might be had in the action, and arising on contract or ascertained by the decision of a court. It can be pleaded only in an action founded on contract."

The action of defendant in error, being one on a book account, was founded on contract. It is true



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that the liability of defendant in error to pay damages is fixed by Section 6397, *supra*, but the cause of action in favor of plaintiff in error grows out of his contract of purchase. Had there been no contractual relation between these parties no cause of action would have arisen in favor of defendant in error. This being true, plaintiff in error had the right to plead this cause of action as a set-off to the claim of defendant in error.

In the cases of *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540, and *Continental Wall Paper Co. v. Voight*, 212 U. S., 228, to which our attention is called, the question we are considering in the present case was not decided. The Ohio statutes relating to counterclaims and set-offs were not before the court in the two federal cases, and the part of the opinion of the court in the Connolly case quoted and relied on by counsel for defendant in error is, therefore, not in point.

*Judgment reversed.*

NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE,  
WANAMAKER and WILKIN, JJ., concur.

## Statement of the Case.

THE STATE, EX REL. KAUTZMAN, *v.* GRAVES,  
SECRETARY OF STATE, ETC.

*Elections—Constitutional amendments—Recount of ballots—Mandamus will not lie, when—Section 5090-1, General Code (103 O. L., 265).*

Under existing laws mandamus will not lie to compel the secretary of state to recount or direct a recount of the ballots counted at an election and preserved under the provisions of Section 5090-1, General Code (103 O. L., 265).

(No. 14775—Decided December 1, 1914.)

## IN MANDAMUS.

This is a proceeding in mandamus instituted in this court by the relator, a resident and taxpayer of the city of Columbus, who, according to the averments of the petition, brings the action on behalf of himself and all others in like situation. The respondent is the duly elected, qualified and acting secretary of state and is the supervisor and inspector of elections of the state of Ohio.

On November 3, 1914, at the general election in the state of Ohio, there were submitted to the electors of the state for their adoption or rejection two amendments, one entitled "Home Rule on the Subject of Intoxicating Liquors," the other "Prohibition of the Sale, Manufacture for Sale and Importation for Sale of Intoxicating Liquors as a Beverage." There is an averment in the petition that Section 5090-1, General Code (103 O. L., 265), provides for the preservation of the ballots

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for the purpose of having errors in counting corrected.

It appears from the petition that in the cities of Cincinnati, Cleveland, Toledo and other places, at said election, there were certain irregularities and illegalities in the conduct of the election and that frauds were perpetrated by the election officers and others at said election, and that by reason thereof there was an incorrect and illegal count of the votes cast on these two amendments. These irregularities, illegalities and frauds are described in the petition and are covered by some sixteen charges.

There is an averment that on the day following the election there was filed with the county board of deputy state supervisors of elections in Hamilton, Franklin, Cuyahoga and Lucas counties, a protest against said irregularities, illegalities and incorrect count, and a demand was made for a recount of the ballots, which demand was ignored by these county boards. It is averred that because the judges of elections, for the reasons mentioned in the petition, did not count the ballots correctly, as provided by law, it appears that the home-rule amendment was adopted, while in fact if the official count is made correctly it will show that the legal votes cast against the home-rule amendment exceed those cast for the amendment and that the ballots cast for prohibition largely exceed those cast against it.

It is then averred that on November 14, 1914, the respondent, as state supervisor and inspector of elections, was requested, for the reasons mentioned in the petition, to make a recount of the ballots, or

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to order the county boards of elections to do so, and that he refused to take action for the reason that the authority for so doing, in his judgment, was not clear and he would await the decision of the court upon the question.

The prayer of the petition is that this court order the respondent, as chief supervisor and inspector of elections, to proceed at once to a recount of the ballots in the counties of Hamilton, Cuyahoga, Franklin and Lucas, or to order the county boards of supervisors of elections in said counties to make a recount and to preserve the ballots until the recount is completed. The relator prays also for such other and further relief as he is entitled to in law.

The case was presented to this court upon demurrer to the petition, the contention of the respondent being that the facts set out in the petition do not entitle the relator to the relief he seeks.

*Mr. Wayne B. Wheeler and Mr. J. A. White, for relator.*

*Mr. T. S. Hogan, attorney general; Mr. Judson Harmon; Mr. Simeon Johnson; Mr. A. J. Freiberg; Mr. Frank Davis, Jr.; Mr. P. E. Dempsey and Mr. James I. Boulger, for respondent.*

NEWMAN, J. It is suggested that if this court find that the relator is entitled to relief the extent to which it could go in its order would be to require the respondent to make an investigation of the charges of fraud, illegality and irregularity. Such

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an investigation would be futile if the secretary of state did not have the authority to recount or order a recount of the ballots in the event the charges were found by him to be correct. There would be no adequate or effective remedy for the redress of the wrongs of which the relator complains. Assuming, then, that the charges relied upon by the relator are true and assuming that the relator here is entitled to make the relation, we shall determine only what is concededly the real and important question in the case, viz., Will mandamus lie to compel the respondent to recount or direct a recount of the ballots voted at the election?

The duties of the deputy state supervisors of elections of the different counties of the state relating to the returns of elections and the abstract of votes to be made by them are prescribed by Section 5093 *et seq.*, General Code. After the count of the ballots by the judges of election there is transmitted to the deputy state supervisors a certified copy of the returns, and within the time fixed by law they open and canvass the returns, make an abstract of the votes and transmit copies thereof to certain officers named in the statute. There is no claim made here that there is any error in the canvass of the returns or in the abstract made and transmitted by the deputy state supervisors, but it is fraud, illegality and irregularity on the part of the judges and clerks and others at the election and in the counting of the ballots of which the relator complains. He avers in his petition that Section 5090-1, General Code (103 O. L., 265), provides for the preservation of the ballots for the purpose

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of having errors in counting corrected. That section is as follows:

"Sec. 5090-1. Before separating, the judges and clerks shall fold in two folds and string closely upon a single piece of flexible wire, all ballots which shall have been counted by them, unite the ends of such wire in a firm knot, seal the knot in such manner that it cannot be untied without breaking the seal, enclose the ballots so strung in a secure cloth or heavy paper covering and securely tie and seal such covering with official wax impression seals, to be provided by the deputy state supervisors of elections, in such manner that it cannot be opened without breaking the seals, and deliver said ballots in such sealed covering to the deputy state supervisors of elections, and such officers shall carefully preserve such ballots for thirty days, and at the expiration of that time shall destroy them by burning without previously opening the package. Such ballots shall be destroyed in the presence of the official custodians thereof and two electors of approved integrity and good reputation and members respectively of the two leading political parties. The said electors shall be designated by the board of deputy state supervisors of elections of the county in which such ballots are kept; provided that if any contest of election shall be pending, at the expiration of said time the said ballots shall not be destroyed until such contest is finally determined. In all cases of contested elections, the parties contesting the same shall have the right to have said ballots opened and to have all errors in counting corrected by the court or body trying such contest, but such

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ballots shall be opened only in open court or in open session of such body and in the presence of the officers having the custody thereof."

The legislature has defined clearly the purpose for which the ballots are preserved. They can be recounted in cases of contested elections only. It is to be observed that the ballots are to be opened and errors in counting corrected by the court or body trying the contest, and they are to be opened only in open court or in open session of such body. No reference is made in this section to the secretary of state. The deputy state supervisors are made the custodians of the ballots, but with no authority whatever to open or recount them.

So there can be no doubt as to when or by whom or where a recount of the ballots can be had. There must be a contest before there is the right in any one to demand a recount. The recount must be made by the court or by the body trying the contest and in open court or before the body in open session.

It is not claimed that there is a contest of election here. In fact, it is conceded that there is no statutory proceeding for contesting an election under a state referendum in the submission of amendments to the constitution. Therefore none of the provisions of Section 5090-1 relating to a recount can apply here. Even if there were a contest pending no authority is conferred or duty imposed by this statute upon the secretary of state to recount or direct a recount of the ballots. This is the only statute bearing upon the subject, and, as we view it, it precludes a recount of ballots by any one other

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than those designated therein, and then only in the manner therein prescribed.

But counsel for the relator say that even if there is no specific authority granted the secretary of state to recount or direct a recount of the ballots, yet he has the implied power to do so. In Section 1*b* of Article II of the Constitution it is provided that any proposed law or amendment to the Constitution submitted to the electors, if approved by a majority of the electors voting thereon, shall take effect thirty days after the election at which it was approved and shall be published by the secretary of state. Section 4787, General Code, makes the secretary of state the state supervisor and inspector of elections, and as such he is to perform the duties of such office as prescribed in the title of which the section is a part.

It is claimed by counsel that a reasonable construction of the duties imposed upon this officer, as found in Section 4787, General Code, and in Section 1*b* of Article II of the Constitution, makes clear his duty to make the recount in order that he may publish a truthful result of the election.

It is true that in addition to powers expressly conferred by statute upon an officer he has impliedly such other powers as are necessary for the due and efficient exercise of those powers expressly granted. The duties of the secretary of state in canvassing the returns and in declaring the result of the election are specifically fixed by statute and are purely ministerial. He is not authorized to try an election contest or to pass upon the validity of election returns made to him. Were such authority



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given this official then the question of implied power to perform these duties efficiently might arise.

But, as we have seen, the legislature has provided for the preservation of the ballots by Section 5090-1 and has expressly prescribed by whom and under what conditions they shall be counted. If it had intended that the secretary of state could recount or order a recount he would have been designated in the statute. To hold that the secretary of state has implied power to do an act the performance of which is in positive and certain terms confined to a court or a body trying an election contest, would be usurping the powers and functions of the legislature. In our opinion there is no implied power in the secretary of state to do what relator would have him do.

Mandamus is defined by statute. Section 12283, General Code, reads: "Mandamus is a writ issued, in the name of the state, to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station."

In *Selby, Auditor, v. The State, ex rel.*, 63 Ohio St., 541, the court say: "The writ may issue to command 'the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.' It may not issue to compel the performance of an act not so enjoined."

Can it be said that the recounting or ordering a recount of the ballots voted at the election is an act specially enjoined upon the secretary of state as a

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duty resulting from his office? Not only is the performance of this act not enjoined upon him, but under the plain provisions of the statute relating to the preservation of the ballots no one except the court or body trying the election contest has authority to open or count the ballots.

Counsel for the relator admit that under the ruling of the court in *Link v. Karb, Mayor*, 89 Ohio St., 326, injunction is not the proper remedy for reaching the alleged irregularities and illegalities in the count. They say this not being an action where *quo warranto* will lie, and there being no specific method for contesting the election under the state referendum, the only remedy left is mandamus, and if they are unsuccessful in this there is no remedy for the present wrong which they claim is about to be inflicted on the state.

The power to provide a remedy for the redress of the wrongs of which the relator complains rests in the general assembly, and courts have no authority to usurp the powers of that body. The legislature has seen fit to provide for the preservation of the ballots voted at an election. It has prescribed the conditions under which these ballots can be counted, viz., in case there is a contest of election. It has failed to provide a method for contesting an election under a referendum. Section 21 of Article II of the Constitution provides that the general assembly shall determine by law before what authority and in what manner the trial of contested elections shall be conducted. It is not within the power of the court to do so. The failure of the

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legislature to provide for a contest confers no jurisdiction upon the courts. *Link v. Karb, Mayor, supra.*

*Demurrer sustained and writ refused.*

NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE and WANAMAKER, JJ., concur. WILKIN, J., not participating.

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## JONES v. THE TURNEY &amp; JONES COMPANY ET AL.

*Receivership—Creditors' committee—Assignment of claims by creditors—Interagreement by two stockholders—Stockholders' liability—Purchase of claims by one stockholder—Accounting in action to enforce liability—Remedies.*

(No. 14025—Decided December 1, 1914.)

## ERROR to the Circuit Court of Franklin county.

John S. Jones filed in the common pleas court in this action an answer and cross-petition in which, among other things, he averred that Henry D. Turney and himself were the principal stockholders and the only solvent stockholders of The Turney & Jones Company; that in 1898 said company became involved financially and unable to continue business, and suits were commenced in the courts to wind up the affairs of said corporation, convert its assets into money, and receivers of said company were appointed in said action for that purpose; that during the next two or three years all of the assets of said company were collected and distributed

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among its creditors, and in order to facilitate said distribution a creditors' committee was appointed on behalf of said company and on behalf of said Turney and Jones; that most of the creditors surrendered their claims against said company and assigned the same to this committee, and that as to all the creditors who assigned their claims the affairs of said corporation have been finally settled; that at the time of the appointment of said creditors' committee it was apprehended by said Turney and Jones that certain creditors of said company would refuse to come into said settlement and would hold all balances due on their claims, respectively, for the purpose of enforcing the stockholders' liability against said Turney and said Jones; that if either of them was obliged to personally pay any money on said individual stockholders' liability to the creditors refusing to come into the settlement they would account with each other and each would pay one-half of the amount that either was obliged to pay on account of these outstanding claims not paid or settled through the creditors' committee; that said written agreement was made on or about the 26th day of August, 1899.

That afterwards Charles C. Higgins, one of the creditors who refused to enter into this settlement or to assign his claim to said creditors' committee, commenced this action to enforce the stockholders' liability against Turney and Jones on behalf of himself and all other creditors, and that thereafter such proceedings were had that the following claims of creditors were approved and allowed against said The Turney & Jones Company:

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Charles C. Higgins, \$235.22; The National Lead Company, \$391.01; Trustee of Park Bros. & Co., \$118.75; Samuel Butler & Company, \$119.12; Henry D. Turney, \$13,645.45; that the above claims were the only ones presented or allowed in this action.

He further avers that the above claim, presented by Henry D. Turney and approved and allowed against said The Turney & Jones Company, consisted of claims of various creditors that Henry D. Turney had settled and paid in accordance with the terms of the contract in reference thereto, and that this defendant had no knowledge that said claims had been presented by Henry D. Turney until after the same had been allowed. This defendant further avers that, acting under and in pursuance of said written contract, he has personally paid and adjusted a large amount of claims against The Turney & Jones Company; that the aggregate amount of these claims paid, settled and adjusted by the said Henry D. Turney and this defendant, respectively, are largely in excess of the money expended by either of them in the purchase and settlement of said claims, but that the said Turney refuses to account with this defendant upon any fair and equitable basis in reference to the amounts paid by each in purchasing said claims of creditors. The defendant further avers that judgment was obtained against him upon his liability as stockholder in a large sum of money, and he asks that the receiver be enjoined from collecting the same, and that there may be an accounting had between this defendant and Henry D. Turney in accordance

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with their rights and liabilities as stockholders of said corporation. To this answer and cross-petition a demurrer was filed, which demurrer the common pleas court sustained. Upon appeal by the defendant Jones the circuit court also sustained the demurrer, and this proceeding in error is prosecuted to reverse the judgment of the circuit court.

*Mr. Thomas E. Powell and Mr. Barton Griffith,*  
for plaintiff in error.

*Messrs. Webber, McCoy, Schoedinger & Jones;*  
*Messrs. Morton, Irvine & Blanchard and Mr. R. J.*  
*Odell,* for defendants in error.

BY THE COURT. While the answer and cross-petition of John S. Jones filed in this action contains irrelevant, redundant and immaterial matter, and while there are no averments therein contained that would entitle the cross-petitioner to have the judgment against him in this action upon his liability as a stockholder of the insolvent corporation opened up and set aside or the collection thereof enjoined, and no averments therein that would entitle him to have opened up and set aside the allowance and approval of the claim of Henry D. Turney, yet if the averments of this answer and cross-petition that are copied into the above statement of facts are sustained by the proofs, then the cross-petitioner is entitled to an accounting with Henry D. Turney in accordance with the terms and provisions of the written agreement, the substance of which is pleaded in the cross-petition.

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If these claims were in fact purchased by Henry D. Turney, after this written contract was made and entered into between himself and John S. Jones, notwithstanding that Henry D. Turney advanced his own money for that purpose, they were purchased for the equal benefit of himself and John S. Jones, and the same is true of all claims purchased or paid by John S. Jones. The fact that these claims purchased by Henry D. Turney under such an agreement with his associate Jones, if they were so purchased, were afterwards presented and their full face value allowed in this action as valid and existing claims against this insolvent corporation, does not divest the cross-petitioner of his joint interest with Turney therein. These claims having been approved and allowed in this action, the cross-petitioner is therefore entitled to assert his interest therein in this suit upon distribution, and should not be required to bring a separate action therefor.

It further appearing that the ascertaining of the respective rights of the cross-petitioner and Henry D. Turney in the claims presented and allowed, involves an accounting between said parties, such accounting should be had in this action as to all the transactions covered by this contract, and this would include the moneys paid and expended both by Jones and Turney under the terms of this contract in the settlement and discharge of claims against this insolvent corporation, together with all moneys that either has paid or may be compelled to pay into court in the satisfaction and payment of claims allowed, together with all costs taxed generally against the funds in the hands of the

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receiver, but not including any costs that are now or may hereafter be adjudged specifically against either of said parties.

For the reasons above stated the judgment of the circuit court is reversed, and the cause is remanded to that court with directions to overrule the demurrer to this answer and cross-petition.

*Judgment reversed.*

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER and WILKIN, JJ., concur.

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## HIER v. STITES.

*Malpractice—Physician—Expert testimony—Degree of skill required—Charge to jury.*

(No. 13917—Decided December 1, 1914.)

ERROR to the Circuit Court of Hamilton county.

The facts are stated in the opinion.

*Mr. C. D. Robertson and Mr. W. A. Hicks, for plaintiff in error.*

*Mr. B. H. Stites and Messrs. Hoffman, Bode & LeBlond, for defendant in error.*

BY THE COURT. This proceeding was begun in the court of common pleas of Hamilton county by the defendant in error against the plaintiff in error.



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In his petition the plaintiff below alleged substantially that in October, 1905, the defendant held himself out to be a practicing physician and surgeon, and that during said month the plaintiff sustained an injury to the nail and end of the middle finger on his right hand; that he employed the defendant as such physician and surgeon to treat the injury; that the defendant conducted himself, in and about his effort to properly treat and heal said injury, so unskillfully, negligently and unprofessionally, that the plaintiff thereby wholly lost the said finger and that his right hand became permanently injured. Further allegations as to the extent of the injury resulting from the alleged negligent, unskillful and unprofessional conduct and treatment are set out, and judgment for damages is prayed for.

In his answer the defendant admits that he is a practicing physician and surgeon; that the plaintiff sustained an injury to the nail and end of the middle finger of his right hand and that the defendant was employed by the plaintiff for consideration to treat said injury, and denies each and every other allegation in the petition contained.

On the trial a verdict was rendered for the plaintiff and the circuit court affirmed the judgment of the court of common pleas which was entered thereon. Error is prosecuted here to reverse the judgments below.

There was considerable testimony introduced by the plaintiff which tended to sustain the issue on his part. In the progress of the treatment several amputations were made, and the jury, in answer to special interrogatories submitted on the application

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of the defendant below, found that the defendant failed to sterilize his instruments and neglected to properly cleanse the wound at the time of the first amputation, and that the treatment by the defendant was "not such as is used by physicians and surgeons of ordinary skill, care and prudence in like or similar conditions and circumstances." They further found, that at the time of the second amputation, the defendant did not sterilize his instruments, did not cleanse the wound antiseptically and that he did not use such treatment as is used by physicians and surgeons of ordinary skill, care and prudence in like circumstances.

Plaintiff in error urges that the trial court erred in the admission of the testimony of expert witnesses. The plaintiff called a physician as an expert and asked him an hypothetical question, in which, after the nature of the injury was described, there was the following: "Now, what would be the ordinary and proper method—the ordinary, usual and approved method for treating that finger in surgery, the injury having occurred say two hours prior to the time the patient came to you for treatment?" Counsel for plaintiff in error insists that the admission of this question and other similar questions violated the rule laid down in *Gillette v. Tucker*, 67 Ohio St., 106, in which it is held that the degree of care which the physician or surgeon is bound to exercise is the average degree of skill, care and diligence exercised by members of the same profession, practicing in the same or a similar locality, in the light of the present state of medical

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and surgical science. In the opinion in that case it is said: "In the engagement of the plaintiff in error, as a surgeon, he assumed to exercise the ordinary care and skill of his profession, in the light of the modern advancement and learning on the subject, and became liable for the injuries resulting from his failure to do so."

In the same case the court quote and approve the rule stated in *Craig v. Chambers*, 17 Ohio St., 253: "The implied liability of a surgeon, retained to treat a case professionally, extends no further, in the absence of a special agreement, than that he will indemnify his patient against any injurious consequences resulting from his want of the proper degree of skill, care, or diligence in the execution of his employment."

It would seem to be clear that a proper course to be followed in the determination of the question whether the average or proper degree of care, skill and diligence has been exercised in a particular case is to ascertain the ordinary and proper method in such cases, and then whether such method was followed in the case on trial. There was no error in the admission of the testimony referred to.

It is also insisted that the court erred in its charge to the jury. Substantially the infirmity suggested is that the court in its charge adopted the principle of law which naturally followed the admission of the testimony to which we have referred.

The court, at the request of the plaintiff in error, gave the following special charge: "In order to recover, the plaintiff must show, by a preponderance of the evidence, and the jury must find, that

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the defendant, in the treatment of the injury to plaintiff's finger, either did some particular thing or things that physicians and surgeons of ordinary skill, care and diligence would not have done under like or similar conditions or circumstances: Or, that the defendant did some particular thing or things, in a manner that physicians and surgeons of ordinary skill, care and diligence would not have done in like or similar conditions or circumstances: Or, that the defendant failed or omitted to do some particular thing or things that physicians and surgeons of ordinary skill, care and diligence would have done under like or similar conditions and circumstances:

"And the plaintiff must also further show and the jury find that the injury complained of was the *direct* result of such doing or failing to do some one or more of such particular things."

This fairly stated the question made in the case and the general charge was in entire harmony with the propositions laid down in the special request, and the court fully charged on the issues made in the pleadings.

As we have indicated, there was substantial evidence in support of the contentions of both parties, and the court properly left the question for the determination of the jury. We find no error in the record, and the judgments below are affirmed.

*Judgments affirmed.*

SHAUCK, JOHNSON, DONAHUE, WANAMAKER,  
NEWMAN and WILKIN, JJ., concur.

## Statement of the Case.

THE STATE OF OHIO *v.* KEITH.

*Criminal law—Joint indictment—Nollied against one defendant—Discharge claimed by remaining defendant—Offense joint and several—Sections 12472, 12473 and 12474, General Code—Embezzling or misapplying bank funds—Section 44, Thomas banking act.*

(No. 14502—Decided December 1, 1914.)

EXCEPTIONS by the Prosecuting Attorney to a Decision of the Court of Common Pleas of Hamilton county.

Keith, the defendant in error, was indicted with one Williams on a large number of counts, charging a violation in various respects, under Section 12473, General Code.

After the jury was sworn the counts were nollied as against Williams. Whereupon counsel for Keith moved the court to discharge him from further prosecution, for the reason that the indictment being a joint indictment against Nathaniel S. Keith and Fletcher R. Williams, and the said Fletcher R. Williams having been discharged, the defendant in error was also entitled to be discharged; that where two persons are jointly indicted the state could not dismiss one and proceed with the prosecution against the other.

The court sustained the motion, to which the prosecutor excepted and brings his bill of exceptions to this court for review.

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*Mr. T. S. Hogan*, attorney general; *Mr. Joseph McGhee*; *Mr. Thomas L. Pogue*, prosecuting attorney; *Mr. Carl M. Jacobs, Jr.*, and *Mr. J. V. Campbell*, assistant prosecuting attorneys, for the exceptions.

*Messrs. Dinsmore & Shohl*, against the exceptions.

BY THE COURT. The statute does not make the offense charged a joint one and neither does any one of the counts of the indictment. The offense is not inherently joint but joint and several; it may be committed by one person or any number of persons, the same as any offense of larceny, conversion or embezzlement.

*Stephens and Everett v. State*, 14 Ohio, 386, has been urged to sustain the ruling of the court below.

A careful reading and analysis of this case, in connection with the syllabus, shows that it has not the slightest application to the case at bar. The syllabus reads:

“On an indictment charging two persons with the commission of a joint offense, both cannot be convicted upon proof that *each* one committed an act constituting an offense *similar* to the act charged in the indictment.”

Undoubtedly this is the law, but it has no relevancy to the case at bar, since the question in this case is “whether or not either defendant singly and alone could be convicted of the offense charged in the indictment.” In the *Stephens-Everett* case, *supra*, the trial court held that both might be con-

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victed, though the evidence did not show that they were both engaged in the same act. The trial judge held, in effect, that though one defendant separate and alone made one unlawful sale of liquor, and the other defendant separate and alone another unlawful sale, they both might be convicted of the same act.

Of course, this was not the law and the result was reversal. The court erred in sustaining the motion on that ground.

But it is urged that the indictment itself did not state an offense against either defendant, and, therefore, though the court may have been wrong as to its reason, it was right as to its judgment. The particular section under which this indictment was drawn is Section 12473, General Code. It is urged that Section 44 of what is known as the Thomas banking act is the basis of this prosecution; that the codifying commission split up this section into Sections 12472, 12473 and 12474, but did not in anywise change or intend to change the description of the offense or the elements necessary to constitute the offense.

An examination of the federal statute from which the Ohio statute was evidently taken, also the earlier Ohio statutes before codification and after codification, persuades us that it was the intention of the legislature to make the phrase "with the intent in any such case to defraud or injure," an essential part of each offense under old Section 44 of the Thomas banking act, and of Section 12473, General Code, which is a part of said Section 44.

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Therefore, the indictment in this case does not charge an offense, and upon this ground the action of the court dismissing the defendant, Keith, was justified. Exceptions are, therefore, overruled.

*Exceptions overruled.*

NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE,  
WANAMAKER and NEWMAN, JJ., concur.

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IN THE MATTER OF THE APPLICATION OF HENRY  
H. STEUBE FOR A WRIT OF HABEAS CORPUS.

*Constitutional law—Weights and measures act—Section 6418-1,  
General Code (103 O. L., 136), unconstitutional—Section 1,  
Article I, Constitution—Habeas corpus.*

Section 6418-1, General Code, as amended February 27, 1913 (103 O. L., 136), is repugnant to Section 1, Article I of the Constitution of Ohio and is invalid.

(No. 14508—Decided December 1, 1914.)

ERROR to the Court of Appeals of Franklin county.

Hilton R. Diegle, an inspector of the Ohio dairy and food department, filed an affidavit with T. H. Hennessey, a justice of the peace in and for Montgomery township, Franklin county, in which he charged that Henry H. Steube, on July 17, 1913, in the county of Franklin, unlawfully sold to him a certain quantity of Irish potatoes, to-wit, about



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one-fourth peck. It was alleged in the affidavit that the potatoes were not sold by avoirdupois weight, nor by numerical count, nor in a sealed package, nor was there an agreement in writing by and between the said parties to sell the potatoes by measure.

Steube was found guilty as charged in the affidavit and ordered to pay a fine of \$10 and costs, or to be imprisoned in the jail of Franklin county until the fine and costs were paid or he was discharged by due course of law.

Steube thereupon filed a petition in the common pleas court of Franklin county for a writ of *habeas corpus*. In his petition he alleged that he was unlawfully imprisoned, detained, confined and restrained of his liberty by the sheriff of Franklin county in the county jail; that said confinement was, by virtue of said order of the justice of the peace, made upon said affidavit charging him with the alleged violation of the provisions of Section 6418-1, General Code of Ohio, as amended by the act of February 27, 1913; that said act is in conflict with the constitution of the United States and the constitution of the state of Ohio, and is therefore void and of no effect.

A writ was granted as prayed for in the petition, directed to the sheriff of Franklin county. The sheriff made a return as required by law in which he stated that he had in his custody the said Steube and that he held the said Steube by virtue of the writ issued by the justice of the peace. A copy of the writ was attached to and made a part of the sheriff's return.

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The matter was heard in the common pleas court upon the petition of plaintiff and the return of the sheriff, and the court found that the petitioner was unlawfully detained in the custody of the sheriff and ordered his discharge and rendered judgment against the sheriff for costs.

In a proceeding in error instituted in the court of appeals by the sheriff the judgment of the common pleas court was affirmed, and the sheriff has filed a petition in this court asking for a reversal of the judgment of the court of common pleas and that Steube be required to carry out the terms of the judgment of conviction rendered against him by the justice of the peace.

*Mr. Timothy S. Hogan*, attorney general, and *Mr. John A. Smith*, for plaintiff in error.

*Messrs. Williams, Williams, Taylor & Nash*, for defendant in error.

BY THE COURT. This case involves the constitutionality of Section 6418-1, General Code, as amended February 27, 1913 (103 O. L., 136), which is as follows:

"All articles hereinafter mentioned, when sold, shall be sold by avoirdupois weight or numerical count, unless by agreement in writing of all contracting parties, viz.: apples, grapes, peaches, pears, plums, quinces, cranberries, prunes, raisins, dates, figs, dried apples, dried peaches, apricots, rice, beans, green beans, carrots, onions, parsnips, Irish potatoes, sweet potatoes, tomatoes, turnips,

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beets, sugar beets, peas, green peas, cabbage, cauliflower, endive, lettuce, spinach, sauerkraut, barley, bran, buckwheat, corn in ear, shelled corn, wheat, rye, oats, sweet corn in ear, shelled sweet corn, hominy, dried sweet corn, popcorn in ear, shelled popcorn, bluegrass seed, broom corn seed, canary seed, cotton seed, castor oil bean, pine tree products and vegetable oils, clover seed, timothy seed, hemp seed, Hungarian grass seed, malt, millet, onion sets, orchard grass seed, rape seed, red top seed, English walnuts, black walnuts, hickory nuts, Brazil nuts, pecans, almonds, filberts, ice, coal, coke, lime, salt, sugar, tea, coffee, bulk spices, cheese, butter, oleomargarine, lard, fresh and salt meats, fish, game, fowls, flour, corn meal, chopped feed, pepper in bulk, and candy in bulk. Nothing in this section shall apply to seeds and other articles in sealed packages. Whoever sells or offers for sale any article in this section enumerated, in any other manner than herein specified, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be fined not less than ten dollars nor more than one hundred dollars for the first offense, and not less than twenty-five dollars nor more than two hundred dollars for the second offense, or imprisoned not more than three months, or both."

Its constitutionality is challenged for the reason that it is in conflict with certain provisions of the federal constitution and with Section 1, Article I of the Bill of Rights of the Constitution of Ohio. There is the further claim that it is in conflict with Section 26, Article II of the Constitution of Ohio, relating to the uniform operation of general laws.

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The statute was held invalid by the court of common pleas for the reason stated in its opinion that it was repugnant to and in violation of Section 1, Article I of the Constitution of Ohio. The court of appeals was in harmony with the view entertained by the court of common pleas and was of the opinion that the statute was likewise in violation of Section 1, Article XIV of the Constitution of the United States. The petitioner was arrested and convicted under this statute, the charge being that he sold a certain quantity of Irish potatoes, viz., about one-fourth peck, that the same were not sold by avoirdupois weight, or by numerical count, or in a sealed package, and that the petitioner and purchaser made no agreement in writing to sell the potatoes by measure.

Section 1, Article I of the Constitution of Ohio, is as follows: "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

The right to contract is recognized as a property right essential to the acquisition, possession and protection of property. The right to the use of measures as a means of trade and commerce has long been established, and the custom of buying and selling by these means the articles enumerated in the act under consideration is one of long standing. Under the provisions of this act, however, unless an agreement in writing is made by all of the contracting parties, whoever sells or offers to sell these

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articles by measure is guilty of a crime and subject to fine and imprisonment. To require the vendor and purchaser of the articles covered by the act to enter into an agreement in writing each time a sale is made by measure, that the sale may be lawful, conflicts with the right to make contracts. As we view this statute, then, it is clearly an invasion of the property rights guaranteed by our constitution.

But it is claimed in support of the constitutionality of the act that the legislature in the exercise of its police power has authority to enact such a law. While it is within the power of the state to guard the public morals, the public safety and the public health, as well as to promote the public convenience and the common good, yet in devising means for such purpose the provisions made must be reasonable. In our opinion this act places an unreasonable and burdensome obligation upon persons engaged in a lawful business and is an unwarranted exercise of the police power. The lower courts were correct in holding this law unconstitutional.

*Judgment affirmed.*

SHAUCK, JOHNSON, DONAHUE and NEWMAN, JJ., concur.

WANAMAKER, J., dissents.

## Statement of the Case.

THE STATE OF OHIO *v.* COX.

*Bill of exceptions by prosecuting attorney—To be filed within forty days of judgment—Section 13681, General Code.*

A bill of exceptions presented by the prosecuting attorney to the trial judge under Section 13681, General Code, must, in conformity with the requirement of the preceding section and of the civil code, be filed within forty days of the rendition of the judgment in the case in which the bill is taken.

(No. 14550—Decided December 1, 1914.)

EXCEPTIONS by the Prosecuting Attorney to the Decision of the Court of Common Pleas of Hamilton county.

The defendant was indicted for a felony on account of acts alleged to have been committed by him as an official of a banking company. On the trial of the indictment the court made rulings of an important character in favor of the defendant, to which the prosecutor excepted. One hundred and forty-six days after the judgment of acquittal in the case, the prosecutor tendered a bill of his exceptions to the trial judge, who, by his endorsement thereon, certified that the bill was a true and correct transcript of the proceedings had in the cause and of the exceptions taken by the prosecuting attorney, and that he, therefore, signed the same without attempting to decide that the bill was presented for his signature at a time which would make it effective, leaving that question for the determination of this court. Upon the presentation of the bill here it was permitted to be filed, the order

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for that purpose "reserving until final hearing of the cause the question as to the time within which a bill of exceptions of this character must be allowed by the trial judge." The defendant having been acquitted upon the trial in the court of common pleas, this proceeding is instituted by the prosecuting attorney for the purpose of settling the law upon the questions involved for the government of future cases.

*Mr. Timothy S. Hogan*, attorney general; *Mr. Joseph McGhee*; *Mr. Thomas L. Pogue*, prosecuting attorney, and *Mr. Carl N. Jacobs, Jr.*, assistant prosecuting attorney, for the exceptions.

*Mr. Frank F. Dinsmore*; *Mr. Walter M. Shohl* and *Messrs. Darby & Benedict*, against the exceptions.

BY THE COURT. The proceeding instituted by the prosecuting attorney is under favor of Sections 13680 and 13681, General Code. These sections were derived from Sections 156 and 157 of the Code of Criminal Procedure passed May 6, 1869 (66 O. L., 287). Some intermediate changes were made at the time of codifications, but they are not deemed to be of importance.

The first of the two sections provides for a bill of exceptions to be taken by the defendant on account of errors conceived by him to have intervened to his prejudice and with a view to the reversal of a judgment of conviction.

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The second originally and now provides for exceptions to be taken by the prosecuting attorney, not with a view to procuring reversal of an acquittal of the defendant, but to obtain the judgment of this court for the settlement of the law for the determination of future cases.

The first of the two sections provides that "The taking of all bills of exceptions shall be governed by the rules established in civil cases." The second provides that "The prosecuting attorney or the attorney general may except to a decision of the court and may present a bill of exceptions thereto, which the court shall sign, and it shall be made a part of the record." This section in its original form as Section 157 contained the provision "which bill shall be made a part of the record, and be in all respects governed by the rules established as to bills of exceptions in civil cases, except as herein provided." The requirement of the statute with respect to civil cases is that a bill of exceptions must be filed within forty days of the judgment in the case. The contention on behalf of the state is that this requirement with respect to civil cases does not obtain with respect to exceptions taken by a prosecuting attorney, because the provision just quoted from Section 157 of the original code is omitted from Section 13681, General Code, now in force.

It is pertinent to observe that there is no authority except the statute for the taking of a bill of exceptions, and that with respect to all proceedings in error it is required that the provisions of the statute be substantially complied with. The former of the



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two sections quoted prescribes the requisites to a bill of exceptions. One of those requisites, by the express terms of the statute, is that the taking of all bills of exceptions must be governed by the rules established in civil cases. There being in Section 13681 no express provision of the statute upon that particular subject, it must be taken for granted that the bill of exceptions which the prosecuting attorney or attorney general may tender to a trial judge for signature is a bill of exceptions which complies with the definition contained in the preceding section. Having defined the bill in one section, the legislature was not required to give the definition of it or state any requisite with respect to the taking of a bill in the section immediately following. Either this conclusion must be adopted or it must be assumed that at any time, no matter how remote from the trial, a bill of exceptions may be presented to the trial judge, for there is no other provision with respect to the time of the taking of the bill.

On mature reflection and an analysis of the statute we are of the opinion that the bill of exceptions was not so taken as to become a part of the record and it will be dismissed.

*Exceptions dismissed.*

NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE,  
WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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BOARD OF COMMISSIONERS OF HENRY COUNTY v.  
THE STATE, EX REL. THE COMMERCIAL STATE  
BANK OF NAPOLEON.

*County commissioners—Award of county money to banks—Offering highest rate of interest—Sufficiency of security for active and inactive deposits—Provisions of Section 2717, General Code, are mandatory, when.*

The provision in Section 2717, General Code, that the county commissioners shall award the use of the county money to the bank that offers the highest rate of interest therefor, provided proper sureties, securities or both, are tendered in the proposal, is mandatory, and those officials cannot refuse to award the use of the inactive deposits of the county to a bank offering the highest rate of interest therefor, for the sole reason that in its proposal for the inactive deposits it names as sureties the same individuals named in its proposal for the use of the active deposits of the county.

(No. 14526—Decided December 15, 1914.)

ERROR to the Court of Appeals of Henry county.

Facts are stated in opinion.

*Mr. R. W. Cahill; Mr. W. W. Campbell and Messrs. Donovan & Warden, for plaintiff in error.*

*Mr. George Meekison, for defendant in error.*

NEWMAN, J. This was a proceeding in mandamus in the court of appeals of Henry county to compel the county commissioners to designate the defendant in error, The Commercial State Bank of Napoleon, the relator, as an inactive depository of

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the public money of Henry county to the amount of \$100,000 in excess of \$50,000 awarded to The Corn City State Bank of Deshler, Ohio.

Pursuant to notice duly published by the county commissioners, inviting sealed proposals from banks and trust companies to act as inactive and active depositaries of Henry county, seven proposals were filed. For inactive deposits The Corn City State Bank bid  $3\frac{1}{2}$  per cent. on \$50,000; The Commercial State Bank bid  $3\frac{1}{2}$  per cent. on \$100,000; The Napoleon State Bank bid 3 per cent. on \$150,000, 2.5 per cent. on \$125,000; 2.2 per cent. on \$100,000; 2.1 per cent. on \$75,000, and 2 per cent. on \$50,000, and The First National Bank bid 2.9 per cent. on \$40,000. For active deposits The Commercial State Bank bid 2 per cent., The Napoleon State Bank bid 1.3 per cent. and The First National Bank bid 1.3 per cent. The several banks tendered in their proposals either personal sureties or municipal bonds or surety companies. The relator, The Commercial State Bank, in its proposals for the inactive and active deposits tendered in each twelve personal sureties, the sureties tendered in its proposal for the inactive deposits being identical with those tendered in its proposal for the active deposits.

The county commissioners awarded the money of the county as follows: To The Corn City State Bank \$50,000 of inactive deposits at its bid of  $3\frac{1}{2}$  per cent.; to The First National Bank \$40,000 of inactive deposits at its bid of 2.9 per cent.; to The Napoleon State Bank \$75,000 of inactive deposits at its bid of 2.1 per cent., and to the relator, The

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Commercial State Bank, all of the active deposits of the county at its bid of 2 per cent.

The court of appeals in its conclusions of fact found that the sureties tendered in the two proposals of the relator, The Commercial State Bank, were eligible, competent and proper sureties in at least the sum of \$250,000. It found that the relator was able, ready and willing to enter into a bond conditioned, as required by law, for the faithful performance of its duties as depositary of either or both active or inactive deposits, and that it was able, ready and willing to furnish such additional sureties on such undertaking as the county commissioners might request for the repayment of both active and inactive deposits, in such manner and form as the commissioners might direct.

The commissioners took no action on the proposal of the relator other than to award to it the active funds, and did not request any additional sureties as to either of its said proposals. For the period covered by the bids the inactive funds of the county will probably average an aggregate amount of not less than \$165,000.

The court of appeals found further that with the exception of The Corn City State Bank the relator, The Commercial State Bank, was the highest and best bidder for the inactive funds and that it was to the best interests of Henry county that the inactive funds not awarded to The Corn City State Bank be awarded to the relator.

The court ordered that a writ of mandamus issue to the county commissioners compelling them to designate the relator as an inactive depositary of

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the public money of Henry county to the amount of \$100,000 in excess of the \$50,000 awarded to The Corn City State Bank. Plaintiff in error is here asking a reversal of the judgment of that court.

The statutory provisions relating to county depositaries are found in Sections 2716 to 2745, General Code. Under the provisions of Section 2716 the commissioners are required to publish notice inviting proposals from banks and trust companies to act as depositaries, and there is this further provision: "Each proposal shall contain the name of the sureties or securities, or both, that will be offered to the county in case the proposal is accepted." Section 2717 fixes the time for the opening of the proposal and provides that "The commissioners in open session shall open the sealed proposals and award the use of such money to the bank or banks or trust companies that offer the highest rate of interest therefor on the average daily balance, provided proper sureties, securities or both, are tendered in the proposal." Section 2726 relates to the undertaking to be entered into by the successful bidder. It contains, among others, this provision: "The same surety shall not be accepted on more than one undertaking as to any one depositary at the same time."

Counsel for the commissioners maintain that the relator, in its proposal for the inactive deposits, having tendered sureties identical with those tendered by it in its proposal for the active deposits, and Section 2726 providing that the same surety shall not be accepted on more than one undertaking as to any one depositary at the same time, the relator did not

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tender "proper sureties" within the meaning of those words as used in Section 2717, and that therefore the provisions of these two sections were not complied with.

The proposal of the relator to become the depository for \$100,000 of the inactive deposits of the county complied with the provisions of Section 2716. It stipulated the rate of interest it would pay, to be computed on the average daily balances, and agreed to enter into and execute a bond in such sum as might be required by the commissioners, conditioned according to law, and named twelve persons eligible and responsible who would sign the bond. If no proposal had been made by the relator for the active deposits the commissioners could not possibly have made any objection to the proposal for the inactive deposits, or if the proposal for the active deposits had not been accepted they undoubtedly would have awarded the inactive deposits to the amount of \$100,000 to the relator. The only reason suggested by the commissioners for their refusal to award to the relator the inactive deposits was that the same individuals were tendered as sureties in the proposal of the relator for the active deposits. This fact could not destroy the legality of the proposal for the inactive deposits.

It was found by the court of appeals that, with the exception of The Corn City State Bank, the relator was the highest and best bidder for the inactive deposits and that it was to the best interest of Henry county that the inactive deposits not awarded to The Corn City State Bank be awarded to the relator. This the commissioners should have done,

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and they were authorized to demand other and further sureties or securities when the undertakings required by Section 2726 were entered into. Section 2728 gives the successful bidder thirty days within which to execute the undertaking, and it is upon the acceptance by the commissioners of such undertaking that the bank becomes the depository of the money of the county. The court of appeals found that the relator was able, ready and willing to enter into a bond as required by law for the faithful performance of its duties as depository of either or both active and inactive deposits, and was able, ready and willing to furnish such sureties on the undertaking as the commissioners might require. As we view it, the objection of the commissioners to the proposal of the relator was technical and without merit. The proposal conformed to the requirements of Section 2716. The provision in Section 2717 that the commissioners shall award the use of the money to the bank that offers the highest rate of interest is mandatory, and the relator should have been awarded the use of \$100,000 of the inactive deposits of the county. When the commissioners did not make this award it was a failure to perform an official duty enjoined by law and in the interest of the county and the taxpayers. Upon the facts found by the court of appeals the judgment of that court is correct and the same is affirmed.

*Judgment affirmed.*

NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE,  
WANAMAKER and WILKIN, JJ., concur.

## Statement of the Case.

## THE CITY OF CINCINNATI v. HARRIS ET AL.

*Cincinnati Southern Railway—Bond issues—Interest and sinking fund—Acts authorizing bond issues—Conform to Section 11, Article XII, Constitution—Ordinance providing levy unnecessary, when.*

1. The act of March 5, 1913 (103 O. L., 112), supplementary to the act of May 17, 1911 (102 O. L., 111), conforms to the requirement of Section 11, Article XII of the Constitution of Ohio.
2. This act and the act of May 17, 1911 (102 O. L., 111), is the legislation under which the indebtedness evidenced by the proposed issue of bonds is incurred within the meaning of Section 11, Article XII of the Constitution of Ohio.

(No. 14719—Decided December 15, 1914.)

ERROR to the Court of Appeals of Hamilton county.

On the 20th day of July, 1914, the city of Cincinnati, by Walter M. Schoenle, city solicitor, filed its petition in the common pleas court of Hamilton county, Ohio, seeking to enjoin the board of trustees of The Cincinnati Southern Railway Company from issuing bonds provided for in the resolution of March 16, 1914, under authority of an act of the general assembly of the state of Ohio, passed May 17, 1911 (102 O. L., 111), entitled an act supplementary to an act passed April 23, 1898, and the supplemental act thereto, passed March 5, 1913 (103 O. L., 112), and to enjoin and restrain the trustees of the sinking fund of the city of Cincinnati from carrying out their agreement to purchase a portion of said bonds for the reason stated in the petition that the legislation under which the pro-



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posed indebtedness is to be incurred does not conform to the provisions of Section 11 of Article XII of the Constitution of Ohio, as amended September 3, 1912.

To this petition the defendants filed separate answers. To these answers the city demurred. The common pleas court overruled these demurrers, and the plaintiff not desiring to plead further, judgment was entered for the defendants. The cause was appealed to the court of appeals of Hamilton county, which court also overruled the demurrers to the separate answers of defendants, and a like judgment was entered in that court. This proceeding in error is brought to reverse the judgment of the court of appeals.

*Mr. Walter M. Schoenle*, city solicitor, and *Mr. Saul Zielonka*, assistant city solicitor, for plaintiff in error.

*Mr. W. T. Porter*, for defendants in error.

DONAHUE, J. It is contended upon the part of the plaintiff in error that the legislation under which this proposed indebtedness is to be incurred does not conform to the provisions of Section 11 of Article XII of the Constitution of Ohio, which section reads as follows:

“No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for the levying and collecting annually by

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taxation of an amount sufficient to pay the interest on said bonds, and provide a sinking fund for their final redemption at maturity."

It is insisted that, because the board of trustees of The Cincinnati Southern Railway has no authority to make provision for interest and sinking fund purposes, it is necessary that the city council of the city of Cincinnati should pass an ordinance making provision for the levying and collecting annually by taxation of a sum sufficient to pay the interest on these bonds and to provide a sinking fund for their final redemption at maturity before these bonds can be lawfully issued. While it is true that the board of trustees of The Cincinnati Southern Railway has no authority to make or provide for such levy, yet it by no means follows that it is necessary for the city council to supplement the statute, under authority of which these bonds are proposed to be issued, by an ordinance providing for such a levy. The act of March 5, 1913 (103 O. L., 112), provides, among other things, that the bonds to be issued under authority of the act of May 17, 1911 (102 O. L., 111), "shall be secured by a pledge of the faith of the city and a tax in addition to all other taxes for municipal purposes *which shall be annually levied by the council of said city on the real and personal property returned on the grand levy sufficient to pay the interest thereon and to provide a sinking fund for their final redemption.*" This is the legislation under which this indebtedness is incurred, and this legislation conforms in letter and spirit to the provisions of Section 11 of Article XII of the Constitution of this

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state. This act is equally mandatory upon the council of the city of Cincinnati, not only as now constituted but as may be constituted at any time during the life of these bonds, as any ordinance the present city council could now pass.

While it is true that the city council is required to levy this tax, yet it does not necessarily follow that it has the discretion to levy or refuse to levy the same. It may be required to make this levy as an agency of the governmental powers of the state without regard to its official judgment as to the necessity.

*State Board of Health v. City of Greenville*, 86 Ohio St., 1; *Bd. of Comrs. of Champaign County v. Church, etc., Admr.*, 62 Ohio St., 318; *State v. Freeman*, 61 Kans., 90; *State, ex rel., v. Williams, Treas.*, 68 Conn., 131; *People, ex rel., v. Mayor*, 51 Ill., 17.

*Judgment affirmed.*

NICHOLS, C. J., SHAUCK, JOHNSON, WANAMAKER and NEWMAN, JJ., concur.

## Opinion of the Court.

THE NEW AMSTERDAM CASUALTY CO. *v.* JOHNSON,  
ADMX.

*Accident insurance—Death by cold plunge bath—Causing dilation of heart—Not within terms of policy, when.*

Where an insured holding an accident policy indemnifying him against bodily injuries which independently of all other causes are effected solely and exclusively by *external, violent and accidental* means, suffers an injury due to the dilation of the heart following the voluntary taking of a cold-water bath, it will not be considered as the result of an accident where under the circumstances attending the dilation, there is no evidence that anything occurred which the insured had not planned or anticipated, excepting the dilation and its consequences.

(No. 14143—Decided December 15, 1914.)

ERROR to the Court of Appeals of Cuyahoga county.

Facts are stated in opinion.

*Messrs. Seaton & Paine*, for plaintiff in error.

*Messrs. Ford, Snyder & Tilden*, for defendant in error.

NICHOLS, C. J. This is an action on a policy of insurance issued by The New Amsterdam Casualty Company to Charles W. Johnson, of the city of Cleveland, Ohio, indemnifying him against bodily injuries which, independently of all other causes, were effected solely and exclusively by external, violent and accidental means.

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The petition avers that on June 6, 1909, the insured had been out horseback riding, and coming home took a cold plunge, as he frequently had done before and as is frequently done by others, under the same or similar conditions, without any ill effects whatever; that the plaintiff in taking such cold bath did not expect, anticipate or intend that any ill effects should follow in consequence thereof and that the plaintiff had no reason to expect or anticipate such ill effects; that in consequence of the shock caused to plaintiff's system, by contact externally of the cold water in said plunge with his body, there was caused an acute dilation of the heart of the plaintiff for a period of twenty-nine weeks.

The defendant company in its answer denied that the injury, alleged in the petition to have been sustained by voluntarily taking a cold plunge bath, was a bodily injury effected solely and exclusively by external, violent and accidental means.

The essential facts in the case are entirely free from controversy.

The insured was a well and active man. He had no organic trouble with his heart. He was accustomed to take cold plunges, when heated and after exercising and horseback riding, without any apparent trouble. The cold plunge caused the heart dilation. The dilation of the heart from taking the cold plunge was an unusual result and one not reasonably to have been expected.

However, the danger in taking such bath when heated is known to the average layman. Heart dilation following the taking of such bath when

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heated is a natural result from a natural cause. The bath was taken in tub, not under shower or spray.

Verdict was had for the insured.

Error is prosecuted on two grounds:

First. That the trial court erred in overruling the motion of the company for an instructed verdict.

Second. In the charge of the court defining what would constitute an injury occurring by accidental means under terms of the policy.

Argument: The issue in the case is one of law wholly.

The respective claims of the parties may be fairly stated as being: First. On the part of the insured: That if the event preceding the injury, and which proximately caused the injury, produced injurious results not common or usual or to be reasonably anticipated as a result therefrom, the unlooked-for result makes the initial event an accident and the injury one sustained by accidental means—in short, the result determines the cause.

Second. On the part of the company: That the event preceding the injury (in this case the cold plunge) and which was the proximate cause of the injury *must be* in the nature of an accident; that an unexpected or unusual result of an act not an accident in itself does not render it (the act) an accident or the consequent injury one happening from accidental means. In other words, the cause determines the result.

In construing the language of an insurance policy it has been universally and properly held that the

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words of limitation should be most favorably construed in behalf of the insured and against the company.

This does not mean, however, that a strained, unnatural and forced meaning should be given words or phrases, but rather the everyday meaning, which must have been plainly in the minds of the contracting parties.

It can hardly be asserted that the act of voluntarily entering a bathtub filled with cold water is an accident. If some one had pushed the insured into a tub so filled, or for that matter, into a pond of cold water, and the results had followed, which ensued when he voluntarily committed his body to the water, then the act would have been an accident in the ordinary acceptance of the term.

It is not an accident for which an insurance company would be liable if one so insured would, while in a state of lively perspiration, stand before an open window, take cold and die. Nor if, by some grave immoderation in eating, acute indigestion be occasioned and heart failure result. Nor yet, if in taking a dose of strychnine, aware of its poisonous nature and knowing that in certain-sized doses it is a heart stimulant and not deadly, but mistaking the effect of a given quantity, death ensues.

It is urged that heart dilation is not usually attendant on the taking of a cold bath; when it does occur it is unexpected, unusual and unforeseen and therefore an accident.

Undoubtedly an accident, in both its technical and commonly accepted meaning, is an event which occurs without one's foresight or expectation and

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wholly undesigned, yet it is not true that every unusual, unforeseen and unexpected event is an accident within the true meaning of the term as used in insurance policies.

The attending physician in the case at bar says that the result which followed the bath, while unusual, was yet the direct and natural effect of the voluntary immersion of the body of the insured. The insured did nothing but that which he intended to do. He planned for and deliberately entered on the project and, so far as appears, it was carried out precisely as intended. He did not slip or fall. The water was no colder than he wanted it to be. His aim was to lower the temperature by a cold-water bath. Such a bath chills the skin by causing the external blood vessels to contract, hence the blood pressure would be raised and might embarrass a weakened heart by the increased work required. Under normal conditions such a bath really gives tone to the circulation, and in treating cases of high fever the cold-water bath is now generally administered, causing the external blood vessels to contract, increasing the blood pressure and reducing the heartbeat. In this particular instance the weakened heart failed to do its work properly; the sudden contraction of the surface blood vessels must have necessarily and correspondingly increased the blood pressure, thus throwing an additional burden on the heart. It failed to respond to the work of propelling the blood over the body and acute dilation occurred.

In every moment of our conscious or sleeping hours we are all possible victims of errors of the



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human system, respiratory, circulatory or digestive; errors that our physicians would term accidents of nature. Even the diseases which afflict humanity are frequently the result of accidents pure and simple. As has been expressively said, nature slips a cog and the well man is invalidated.

The separation of injuries, occasioned by accidental means from those occasioned by means non-accidental, is not free from difficulty, and an attempt to logically analyze every supposable case of this character and differentiate along consecutary lines would lead to some contradictions.

While the views of the laity cannot in the very nature of things be the controlling gauge wherewith to measure doubtful legal propositions, yet it might be suggested that the average business man, were the question involved in this case submitted to him, would in all likelihood be surprised if not shocked to learn that it had been held that an injury of the character suffered by the defendant in error should be followed by the payment of indemnity by a strictly accident insurance company.

The court is constrained to hold that the result which followed the taking of the bath by the insured was not an accident upon which recovery can be had under the wording of the policy. A case is cited where recovery was had by reason of a ruptured blood vessel occasioned by the mere lifting one's self naturally out of a chair. It is felt by this court that in such case, as in the case at bar, such a conclusion would be unduly pressing the construction of the language universally employed in naked accident policies. It would amount to an unfair

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and unjust enlargement of the company's liability and would convert accident companies into both sick-beneficial and life insurance companies; and, worse than this, the apparent vice of it is that if countenanced it would inevitably result in the necessity of requiring constantly increasing premiums from the vast multitude of the laboring classes as well as people of moderate means who chiefly buy this character of insurance.

The judgment of the court of appeals will be reversed and judgment rendered in favor of plaintiff in error.

*Judgment reversed and judgment for plaintiff in error.*

SHAUCK, JOHNSON, DONAHUE and NEWMAN, JJ., concur.

WANAMAKER, J., dissents.

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THE STATE OF OHIO v. GROSS, *alias* KIMBLE.

*Criminal law—Estoppel—Embezzlement—Insurance agent estopped to deny agency—Because acting under another name—Agency and criminal intent question for jury—Directed verdict erroneous, when.*

1. The principle of estoppel as applied to agency may be invoked in criminal as well as in civil cases.
2. Where G., under the name of K., entered into a written contract of agency with an insurance company, and pursuant to such agency he sells corporate stock of such insurance company by virtue of which he collects money for the sale of such stock, but fails to account for such money to the said insurance

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company, upon prosecution for embezzlement, G. is estopped to deny that he was the agent of said insurance company upon the ground that K. was not his correct name, but upon the contrary his correct name was G.

3. The question of agency and the question of the time of forming criminal intent in a charge of embezzlement are questions for the jury, and unless there is entire failure of proof as to any essential element of the crime of embezzlement, the court is not authorized to direct a verdict.

(No. 14619—Decided December 15, 1914.)

EXCEPTIONS to a Decision of the Court of Common Pleas of Summit county.

Facts are stated in opinion.

*Mr. H. F. Castle*, prosecuting attorney; *Mr. C. P. Kennedy*, assistant prosecuting attorney, and *Mr. J. H. Orgill*, for the exceptions.

*Messrs. Rockwell & Grant*, against the exceptions.

BY THE COURT. One, H. E. Kimble, *alias* George L. Gross, was indicted by the grand jury of Summit county, Ohio, on a charge of embezzling \$2,125. It was charged in the indictment that said Kimble, *alias* Gross, was then and there acting as an agent of The Cleveland National Fire Insurance Company and that by virtue of such agency he came into possession of said \$2,125, which he embezzled. Upon the trial of the case, at the close of the state's evidence, the defendant moved the court for his discharge upon the ground that the crime charged in the indictment had not been proven.

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The court sustained the motion, directed a verdict and discharged the accused. Exceptions to the ruling of the court and its judgment upon said motion were taken by the prosecuting attorney and are now before this court for review.

Counsel supporting the judgment of the court of common pleas rely on three grounds as stated in their brief:

"First. The record does not show that the defendant was the agent of The Cleveland National Fire Insurance Company.

"Second. If any agency existed, it was between the defendant and one James E. Millikin, who was the sales agent of The Cleveland National Fire Insurance Company.

"Third. That if any offense was committed by the defendant it was the offense of larceny or the offense of obtaining money by false pretenses."

The written contract of agency in evidence purports to be between "The Cleveland National Fire Insurance Company, Cleveland, Ohio, first party, and H. E. Kimble, Scranton, Pa., Lycoming Building, second party." The same is signed "The Cleveland National Fire Insurance Company by James E. Millikin, General Manager, H. E. Kimble, second party." Here was direct positive evidence to sustain the allegations of the indictment, and there is nothing in the record to substantially contradict it. Millikin was only an agent of the insurance company and signed as such. Kimble was a sort of subagent, under Millikin, of the same insurance company. This is confirmed not only by

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the written contract between the insurance company and Kimble, but also by the written contract between Millikin and the insurance company. Therefore, upon the question as to whether there was evidence of agency, it is sufficient to say that there was an abundance of it, which should have called for the submission of that issue to the jury.

And even if it were not so, the overwhelming weight of authority, common sense and reason call for the application of the doctrine known as estoppel against the defendant. We too often lose sight of the primary purpose of criminal statutes. They are enacted to protect the public by prohibiting crime and punishing criminals. If a man is agent enough to get possession of money for and in the name of his principal, he is also agent enough to be convicted of embezzlement as such agent. Wharton, Bishop and McLean all agree with this doctrine, and the same has been applied in principle in several Ohio cases.

*State v. Pohlmeyer*, 59 Ohio St., 496: "And the rule that one who receives money or any other thing of value in the assumed exercise of authority as agent for another, is estopped thereafter to deny such authority, applies in criminal prosecutions as well as in civil actions." Also *State v. Carter*, 67 Ohio St., 422.

It matters not that Kimble may have been Gross, Jones or Smith. The actual relation between the individual and company was that of principal and agent. His name had nothing to do with it. It was simply his label for convenient identification.

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It is claimed also that the crime proven by the state was larceny and not embezzlement; that the intent to appropriate or convert this money was the result of a conspiracy between Kimble and others to use this agency as a mask or device to steal the money coming into their hands, and that, therefore, the intent to appropriate, convert or embezzle the money preceded the possession of the money and hence could not have been embezzlement.

It is sufficient to say, however, that there was ample evidence to go before the jury upon this issue of fact as to when the intention to appropriate was formed. Like the question of agency, the question of intent is purely a question of fact, with which the courts have nothing whatsoever to do in the trial of a criminal cause. Such questions are to be determined by juries. Ordinarily a claim by the defendant that he was not an embezzler but a thief would not receive very great favor. It is, however, but just to say that as compared with an embezzler a thief is eminently respectable. An embezzler wins personal confidence whereby he obtains property in trust only to betray that trust and to play the part of traitor, which crime he adds to that of wrongfully appropriating the money.

A general criminal intent to convert all moneys coming into one's possession does not satisfy the demands of the statute of embezzlement. It must be an intention to convert the identical money actually converted, and it is difficult for one to imagine that there was any intention to convert the money charged in the indictment until the time

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at which the money came into the possession of the defendant. At least that seems the more probable theory, so much so that any jury would be amply warranted upon the evidence in the cause in finding Kimble guilty of the crime charged.

Courts must get away from these technical tweedledees and tweedledums, especially so in cases entirely beyond their jurisdiction — matters upon which it is the duty of the jury to pass and not the court. Most of our antiquated, technical precedents had their beginning in a period of English jurisprudence when more than two hundred crimes were capital. The hardships and severities of the law were such that it was as difficult for an innocent man to escape conviction as it now is for a guilty man to be convicted.

The exceptions are therefore accordingly sustained.

*Exceptions sustained.*

NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE,  
WANAMAKER and NEWMAN, JJ., concur.

## Statement of the Case.

## BAXTER v. THE STATE OF OHIO.

*Criminal law—Embezzlement—Change of venue—Evidence of similar offenses—Burden and degree of proof—Charge to jury—Receipt of and accounting for moneys banked—Misconduct of counsel.*

1. Where a defendant is charged by indictment with the embezzlement of funds of an insolvent bank, and upon motion for a change of venue it is made to appear by the affidavit of the accused and the affidavit of ten credible persons residing in the county in which the indictment is returned, that there are residing in that county two hundred and fifty-seven stockholders and more than five thousand depositors in the bank, the funds of which he is charged with embezzling, and that in the opinion of the several persons making such affidavits he cannot have a fair and impartial trial in that county, a change of venue should be ordered.
2. Where evidence of other offenses of a similar character is competent to prove intent, and the accused has not theretofore been convicted of such offenses, the burden is upon the state to prove that the accused is guilty of such other offenses by the same degree of proof required in all criminal cases.
3. Where evidence of former offenses is properly admitted to prove intent, it is the duty of the trial court, at the time such evidence is offered, to instruct the jury the purpose for which it is admitted.

(No. 14620—Decided December 15, 1914.)

ERROR to the Court of Appeals of Franklin county.

At the April term of the common pleas court of Franklin county, Ohio, an indictment was returned by the grand jury against Clement S. Baxter, charging that he was the duly appointed, qualified and acting examiner and deputy superintendent of banks for the state of Ohio, and that in his official capacity certain moneys belonging to The



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Columbus Savings & Trust Company came into his possession, of which moneys he unlawfully and fraudulently embezzled the sum of \$3,140.

The defendant filed a motion for a change of venue, and in support of this motion filed his own affidavit and the affidavit of ten credible persons residing in Franklin county, Ohio, to the effect that in his opinion and in the opinion of the several persons making such affidavits he could not have a fair and impartial trial in Franklin county. It further appeared by affidavit that two hundred and fifty-seven stockholders of the bank, the funds of which he was charged with embezzling, resided in the city of Columbus, Franklin county, Ohio, and that more than five thousand depositors in said bank lived in Franklin county, Ohio. The bank, at the time of the commission of the acts charged in the indictment, was insolvent and in the process of liquidation. The trial court overruled the motion for a change of venue. On the trial of the cause the state offered evidence of other offenses of a similar nature claimed to have been committed by the accused, which evidence was received over the objection of the defendant, his counsel stating in open court, in the hearing of the jury, that such evidence could not be received for any other purpose than to prove the specific criminal intent alleged in the indictment. The court at the time this evidence was received did not charge the jury that the competency of this evidence must be limited to this specific purpose of proving intent.

During the progress of the trial it was sought to show that about this time the plaintiff in error was

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in possession of a certificate of deposit for \$5,000, and counsel for the state further sought to show, by their inquiry of the accused on cross-examination, that he loaned or gave this money to his brother, who at that time was superintendent of banks, to restore to this particular bank the funds the brother had embezzled, and that the accused had knowledge at the time of his brother's criminal act, and had discussed the matter with him at the time of its commission and afterwards. A verdict of guilty was returned and sentence passed by the trial court. Error was prosecuted in the court of appeals of Franklin county, and that court affirmed the judgment of the trial court.

*Mr. John F. Wilson* and *Mr. Kent W. Hughes*, for plaintiff in error.

*Mr. Timothy S. Hogan*, attorney general, and *Mr. Edward C. Turner*, prosecuting attorney, for defendant in error.

BY THE COURT. While the question of a change of venue in a criminal case is within the sound discretion of the trial court, yet it is a substantial right of the defendant to be tried by a fair and impartial jury. Section 13636, General Code, was enacted by the general assembly of Ohio for the purpose of protecting that right. It is specifically provided in Section 11416, General Code, that when a corporation having more than fifty stockholders is a party to a civil action pending in the county in which the corporation keeps its principal office, or transacts

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its principal business, a change of venue must be ordered if the opposite party makes affidavit that he cannot, as he believes, have a fair and impartial trial in that county, and his application is sustained by the affidavits of five credible persons residing in such county. This statute is applicable only to civil cases, but it clearly defines the policy of the state in protecting the right of litigants to a fair and impartial jury. It recognizes the fact that, in the social and business relations of men, any transaction that particularly and financially affects fifty citizens of a county is apt to have such far-reaching influence upon their friends and neighbors that there would be grave danger that a jury impaneled in that county would not be entirely fair and impartial, notwithstanding that examination upon *voir dire* would disclose no legal grounds for challenge.

The particular crime charged in this indictment is not an offense against the person but against property, and therefore comes within the reason of the rule in civil suits.

This defendant is charged by indictment with embezzlement of funds in which two hundred and fifty-seven stockholders residing in the city of Columbus and over five thousand depositors residing in the county are financially interested. It was a matter of concern to all those depositors that the funds of this insolvent bank should be honestly and economically administered. The accused stood in the relation of a trustee to all these interested depositors, who, through no fault of their own, except misplaced confidence in the solvency of this bank, were almost certain to lose a large amount of

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money in any event, and therefore the charge against this defendant that he had increased their probable losses, by the embezzlement of funds that were still available to the creditors, would naturally excite anger and animosity against him. If in a civil suit the court is required to grant a change of venue when only fifty stockholders of a corporation, a party to the suit, reside within the county, it would seem that in a criminal case, where it is made to appear by evidence offered that over five thousand people residing within the county are financially interested in the funds charged to have been embezzled by the accused, a motion by the defendant for a change of venue should be allowed. Certainly it is not the policy of our law to be more zealous in the protection of the property rights of its citizens than in the protection of their liberties.

While evidence of other offenses is competent for the purpose of showing intent when criminal intent is a specific element of the crime charged, yet this evidence is of a highly dangerous character and should be admitted with great caution. A jury is never authorized to consider this evidence for any purpose whatever until after it has found, from the other evidence in the case, that the defendant has committed the acts charged in the indictment. Evidence of other offenses may then be considered by the jury for the sole purpose of determining the intent of the accused at the time of the commission of the acts charged, and it is the duty of the trial court to so charge the jury at the time such evidence is admitted. In this case when counsel for the state offered evidence of other offenses of a

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similar nature counsel for the defendant correctly stated in open court and in the presence of the jury the purpose for which such evidence might be received, and it is, therefore, claimed that this relieved the court from the duty of charging the jury in that regard, but it must be remembered that the jury take the law as given them by the court, and not by counsel, and this statement of counsel on that behalf cannot be regarded further than as a request to the court to so charge.

Evidence of a vague and uncertain character offered for the purpose of proving that the defendant had been guilty of similar offenses should never be admitted under any pretense whatever. True, it is not always possible to show an entire transaction by one witness, and, therefore, if the state offers evidence which may become important in connection with other evidence proposed to be offered later in the case, it should be admitted, but if the state fails to introduce such further evidence which, if uncontradicted, would authorize the jury to find the defendant guilty of the other offenses sought to be proven, then there is an absolute failure on the part of the state to make a *prima facie* case of guilt of the defendant of these other offenses, and it becomes the peremptory duty of the trial court to strike such evidence from the record and to instruct the jury that they are not to consider it for any purpose whatever.

In this particular case the state sought to prove that this defendant had been guilty of a similar offense in Cincinnati, Ohio, and a similar offense in Kenton, Ohio. The evidence offered on behalf

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of the state in respect to these two other offenses was absolutely and wholly insufficient to make anything like a *prima facie* case against the defendant as to these transactions. If the accused had then been upon trial for either of these offenses, it would have been the duty of the trial court to instruct the jury to return a verdict of "not guilty." The whole scope and extent of the evidence offered tended to prove no more than a suspicion of guilt. If either of these offenses had in fact been committed, the evidence did not connect this defendant with them further than to show that he had the opportunity to be guilty, but it also appeared that at least a half-dozen other persons in each of these transactions had equal opportunity with the defendant to appropriate the funds claimed to have been embezzled.

The court of appeals of Franklin county, which is the court of last resort on disputed questions of fact, found that the testimony admitted in regard to these other offenses was of such a circumstantial character that it did not afford even probable cause that the defendant was guilty, but refused to reverse for this reason upon the theory that this evidence before an intelligent jury would not have any weight.

Evidence that an accused was guilty of other similar offenses must be such that a jury would be authorized to find him guilty of these offenses. The trial court erred in receiving this evidence, erred in failing to instruct the jury at the time it was received as to the purpose for which it was competent, and erred in not striking all of this evidence relating to these other transactions from the record

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and instructing the jury to disregard the same. The trial court did charge the jury in its general charge that it must find from the evidence offered that the defendant was guilty of these other offenses, beyond a reasonable doubt, before it would be authorized to consider that evidence for any purpose. But this charge, while perfectly proper in a proper case, could not be otherwise than prejudicial to the accused in this particular case, because the jury would necessarily infer therefrom that there was substantial evidence of the guilt of the accused of these other offenses that it was authorized to consider when in truth and in fact there was no such evidence.

Evidence that a brother of the accused had embezzled funds of the same bank or had been indicted for embezzlement of such funds was incompetent in any view of the case. Counsel for the state had a right to show that this accused was in possession of large sums of money immediately following the time of the alleged embezzlement, and thereby put upon the defendant the burden of explaining the source from which he received this money, but counsel had no right to so shape their inquiries in reference to the possession of this money by the accused, or in reference to the possession by him of a five-thousand-dollar certificate of deposit, as to indicate by the question that the brother had been charged with embezzlement and that this five-thousand-dollar certificate of deposit was given or loaned to the brother for the purpose of enabling him to return moneys embezzled by him. Nor had counsel for the state the right to inquire of the

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accused upon cross-examination whether he knew of this transaction of his brother at the time it was committed, or whether he had discussed the same with him then or later. Regardless of the answers given by the accused to these questions, the inquiries themselves were wholly improper and grievously prejudicial to the accused.

In reference to the objection made as to misconduct of counsel for the state, it is apparent from this record that not only counsel for the state but counsel for the accused were permitted larger liberties during the progress of this case than is consistent with a fair and impartial trial. The altercations between counsel, side remarks by counsel loud enough to be heard by the jury, comments by counsel during the trial upon evidence offered or answers made by witnesses, are all equally out of place in a court of justice and should not be tolerated by the trial judge.

It appearing from the record of this case that error has intervened to the prejudice of the plaintiff in error, the judgment of the court of appeals affirming the judgment of the common pleas court and the judgment of the common pleas court are both reversed, and this cause is remanded to the common pleas court for further proceedings according to law.

*Judgment of the court of appeals and judgment of the common pleas court reversed.*

NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE and NEWMAN, JJ., concur.

WILKIN, J., not participating.



## Statement of the Case.

HON. HUGH L. NICHOLS, CHIEF JUSTICE.

HON. JAMES G. JOHNSON, HON. MAURICE H. DONAHUE, HON. R. M. WANAMAKER, HON. OSCAR W. NEWMAN, HON. THOMAS A. JONES, HON. EDWARD S. MATTHIAS,	}	JUDGES.
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HOCKETT, ETC., ET AL. *v.* THE STATE LIQUOR  
LICENSING BOARD.

*Referendum—Amendment to constitution—Home rule as to intoxicating liquors—Section 9a, Article XV, Constitution, regularly adopted—Validity of amendment.*

1. The constitution and the statutes of Ohio provide ample and adequate legal machinery for the initiation, submission and adoption or rejection of any proposed amendment to the constitution of Ohio by what is known as a referendum vote.
2. Article XV, Section 9a, relating to home rule on the subject of intoxicating liquors, was regularly and legally initiated, submitted and carried by a majority of the voters of Ohio voting thereon at the regular election held in November, 1914, and thereby became a part of the constitution of Ohio.
3. Said amendment is not in conflict with any provision of the federal constitution.

(No. 14788—Decided January 26, 1915.)

ERROR to the Court of Appeals of Franklin county.

*Mr. A. Jay Miller; Mr. H. B. Emerson; Mr. J. A. White; Mr. W. B. Wheeler; Messrs. Howenstine & Huston; Mr. John E. West and Messrs. Miller, Miller, Brady & Seeley, for plaintiff in error.*

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*Mr. Timothy S. Hogan*, attorney general; *Mr. P. E. Dempsey*; *Mr. James I. Boulger*; *Mr. Frank Davis, Jr.*; *Mr. Judson Harmon* and *Mr. A. J. Freiberg*, for defendants in error.

WANAMAKER, J. This case is based on what has become politically known as "The Home Rule Amendment," pertaining to intoxicating liquors.

The question is not "Should it have passed?" That was addressed to the voters of Ohio at the November election. The question is not "What is the meaning and scope of the amendment?" That is a moot question here and must be reserved for concrete cases arising under the amendment if it should be a valid amendment.

The questions here are:

1. Did it carry? Did it become a part of our Ohio constitution?
2. Is it in conflict with the federal constitution?

Plaintiff in error contends that notwithstanding the official returns made to the secretary of state show a majority *prima facie* of 12,618 for the amendment, still said amendment did not carry because there was no valid legal machinery provided, either by the constitution or the statutes, for the submission of such amendment and for the casting, counting and returning of the votes thereon.

Article VIII, Section 1, Bill of Rights of the Ohio Constitution of 1802, contained the following provision:

"\* \* \* Every free republican government, being founded on their sole authority, and organ-

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ized for the great purpose of protecting their rights and liberties, and securing their independence: to effect these ends they [the people] have at all times a complete power to alter, reform or abolish their government, whenever they may deem it necessary."

The Constitution of 1851 contains the following provision:

"All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to *alter*, reform, or abolish the same, whenever they may deem it necessary; \* \* \* ." Article I, Section 2, Bill of Rights, Constitution of 1851.

This provision remains in the Constitution of 1912.

Under the amendments proposed and passed in the Constitution of 1912 for the submission of amendments the following provisions are pertinent. Article II, Section 1, of the Constitution of 1912, reads as follows:

" \* \* \* but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as *hereinafter provided*. They also reserve the power \* \* \* and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls."

Pursuant to this sovereign political power, which is inherent in the people, and their reserved right "to propose amendments to the constitution and to

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adopt or reject the same at the polls," a petition was initiated and filed with the secretary of state calling for the submission of such "home-rule amendment" at the next regular or general election.

No complaint is now made, or ever has been, that the petition was not in due form, duly signed and verified, all in accordance with the provisions of law, but the complaint is that there was no legal machinery, constitutional or statutory, for the submission of such amendment to the people for counting, canvassing and returning the votes thereon and the final determination and proclamation as to the official vote of the people of the state on such amendment. It may also be observed in passing that no claim or contention whatsoever was made prior to the election that such amendment had not been regularly and legally submitted. It is now claimed by the plaintiff in error that the vote on the amendment, therefore, was a mere nullity because the constitution failed to provide the necessary legal machinery agreeable to the words "as hereinafter provided," as found in said Article II, Section 1.

We must remember that we are here construing the constitution of the state of Ohio, affecting five millions of people scattered over more than forty thousand square miles. We are not to use any millimeter measure of interpretation nor employ that strict construction peculiar to criminal law and procedure, but we are to employ that broad-gauged liberal construction that the general terms of constitutional provisions necessarily require in order to make them effective and carry out the real

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intention of the people in making the constitution, through their representatives, and by adopting the constitution, by their own votes.

The polestar in the construction of constitutions, as well as other written instruments, is the intention of the makers and adopters.

Now what was to be "hereinafter provided?"

Manifestly the manner and means of proposing amendments to the constitution and adopting or rejecting the same by a referendum vote.

An examination of Section 1a, Article II, clearly and conclusively shows that the constitutionmakers proceeded forthwith to "hereinafter provide" for the submission of amendments to the constitution and for a referendum vote thereon. Notice the language of the very next section:

"Sec. 1a. The first aforesaid power reserved by the people is designated the initiative, and the signatures of ten per centum of the electors shall be required upon a petition to propose an amendment to the constitution. When a petition signed by the aforesaid required number of electors, shall have been filed with the secretary of state, and verified as herein provided, proposing an amendment to the constitution, the full text of which shall have been set forth in such petition, the secretary of state shall submit for the approval or rejection of the electors, the proposed amendment, in the manner hereinafter provided, at the next succeeding regular or general election in any year occurring subsequent to ninety days after the filing of such petition. The initiative petitions, above described, shall have printed across the top thereof:

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'Amendment to the Constitution Proposed by Initiative Petition to be Submitted Directly to the electors.'

In addition to these numerous provisions specifically providing for the submission of constitutional amendments for a referendum vote in Section 1a, Section 1g includes the further provisions:

"A true copy of all \* \* \* proposed amendments to the constitution, together with an argument or explanation, or both, for, and also an argument or explanation, or both, against the same, shall be prepared. \* \* \* The secretary of state shall cause to be printed \* \* \* proposed amendment to the constitution, together with the arguments and explanations \* \* \* and shall mail, or otherwise distribute, a copy of such \* \* \* proposed amendment to the constitution, together with such arguments and explanations for and against the same to each of the electors of the state, as far as may be reasonably possible. Unless otherwise provided by law, the secretary of state shall cause to be placed upon the ballots, the title of any such \* \* \* proposed amendment to the constitution, to be submitted. He shall also cause the ballots so to be printed as to permit an affirmative or negative vote upon each \* \* \* proposed amendment to the constitution. The style of all laws \* \* \* shall be \* \* \* and of all constitutional amendments: 'Be it Resolved by the People of the State of Ohio.' \* \* \* ."

Section 1b provides for the ballots on such proposed amendment; also, if the amendment shall carry by a majority of the electors voting thereon,

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when such amendment shall go into effect and the publication by the secretary of state:

"Ballots shall be so printed as to permit an affirmative or negative vote upon each measure submitted to the electors. Any proposed law or amendment to the constitution submitted to the electors as provided in section 1*a* and section 1*b*, if approved by a majority of the electors voting thereon, shall take effect thirty days after the election at which it was approved and shall be published by the secretary of state."

Again, in Section 1*g* we have the following language:

"Any initiative, supplementary or referendum petition may be presented in separate parts but each part shall contain a full and correct copy of the title, and text of the law, section or item thereof sought to be referred, or the proposed law or *proposed amendment to the constitution.*"

This same section goes on to provide who may sign such petitions and how, and then further provides:

"No law or amendment to the constitution submitted to the electors by initiative and supplementary petition and receiving an affirmative majority of the votes cast thereon, shall be held unconstitutional or void on account of the insufficiency of the petitions," etc.

The astonishing thing about these provisions is not their brevity but the minutia and detail with which the constitutionmakers provided for safeguarding the initiative and referendum as to constitutional amendments.

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But after all this was done, in order to make assurance doubly sure, fearing that they might have omitted some clerical step, the Constitution, at the close of Section 1g, provides as follows:

"The foregoing provisions of this section shall be *self-executing*, except as herein otherwise provided. Laws may be passed to facilitate their operation, but in no way limiting or restricting either such provisions or the powers herein reserved."

Agreeable to the last three lines of Section 1g above quoted, the legislature of Ohio had formerly passed the following section (Section 4785, General Code), which reads:

"Except when otherwise provided by law, all public elections in this state shall be conducted according to the provisions of this title."

And Section 5019, General Code, provides how constitutional amendments shall be submitted, as follows:

" \* \* \* The provisions of this title, so far as practicable, shall apply to the marking of ballots and the counting of votes upon any constitutional amendment so submitted."

This section and other kindred sections are found in Part First of the General Code, under the head of "Title XIV. Public Elections," which title provides for the entire election machinery of the state.

Again, Sections 5088 and 5089, General Code, under the same title, provide for the tally-sheet entries and the compiling and preparing of the count



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on the day following the election and the certification of the result thereof to the secretary of state.

But it may be claimed that some of these sections were enacted by the legislature prior to the constitutional amendment on the initiative and referendum, and, therefore, have no application. This is fully answered by the express provision of the constitution saving certain statutes, as found in a schedule adopted with the regularly proposed amendments to the constitution on September 3, 1912. Such schedule reads as follows:

"The several amendments passed and submitted by this convention when adopted at the election shall take effect on the first day of January, 1913, except as otherwise specifically provided by the schedule attached to any of said amendments. *All laws then in force, not inconsistent therewith shall continue in force until amended or repealed;*  
\* \* \* ."

So that by express provision of the schedule all old statutes not repugnant to or inconsistent with the provisions of the new constitution are as applicable to the constitutional amendment as those that are passed subsequently to the adoption of the constitutional amendments of 1912.

So that throughout the constitution and the amendments we have abundance of provision for the submission of the amendment at a public election, for the preparation of the ballots, for the casting and counting of them, the certification of the result and the publication finally by the secretary of state. Indeed, it is difficult to imagine any additional provision that could have been made under

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this right and power of the people for the amendment of their constitution by a referendum vote.

Judge Brewer in the famous Kansas case goes even further and holds that "If there were no legal machinery provision the court nevertheless must take judicial notice of the result."

The language of the court on the prohibitory amendment is found in *Constitutional Prohibitory Amendment*, 24 Kans., 700, and is as follows:

"Suppose a majority did adopt, but no machinery is provided for ascertaining that fact, no one is authorized to canvass and proclaim the result, and no one in fact does so canvass and proclaim: must not the court nevertheless take judicial notice of the result? When the constitution says that upon certain conditions an amendment is adopted, must we not take judicial notice of the happening of those conditions? It is the election, and not the canvass, that works the change; and if we are bound to take notice 'of everything that is allowed to affect the validity of any law,' must we not of everything affecting the fundamental as well as the statute law?"

We hold that this objection to the amendment is not well taken.

As a reenforcement of our position on this question we quote liberally from the pertinent parts of the Kansas case, *supra*, by Judge Brewer:

"And first, the election itself was authorized by law. It was not a mere voluntary proceeding. The proposition was put by legislative sanction before the people, who were invited to consider and act upon it. 'The following proposition \* \* \* shall be submitted to the electors of the state for

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adoption or rejection.' Both constitution and statute name the time and the persons at which and to whom this proposition is submitted. And the statute further provides that the proposition shall be submitted 'at the general election.' This implies something more than the mere matter of time. The constitution says 'at which time.' But the statute goes further: it does not read, at the time, or on the day of the general election, but at that election itself. For the purpose of voting upon and determining the question submitted, it thus refers to and appropriates the statutory machinery of the general election. Concede that this may technically be limited to the mere proceedings of election day, and that the constitution and the statute together, prescribing the form of ballots, the parties entitled to vote, the time of election, and the election machinery, have exhausted their force at the close of the polls, and what then?

"Must not the court take judicial notice of the result? We are bound to know what the constitution is — what the statutes are. We take judicial notice of them. No proof is required — none is proper. \* \* \* 'Of course, we take judicial notice, without proof, of all the laws of our own state. \* \* \* And in doing this, we take judicial notice of what our books of published law contain, of what the enrolled bills contain, of what the journals of the legislature contain, and, indeed, of everything that is allowed to affect the validity of any law, or that is allowed to affect or modify its meaning in any respect whatever.'

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"Now, the constitution provides that, 'if a majority of the electors voting on said amendments at said election shall adopt the amendments, the same shall become a part of the constitution.' Suppose a majority did adopt, but no machinery is provided for ascertaining that fact, no one is authorized to canvass and proclaim the result, and no one in fact does so canvass and proclaim: must not the court nevertheless take judicial notice of the result? When the constitution says that upon certain conditions an amendment is adopted, must we not take judicial notice of the happening of those conditions? It is the election, and not the canvass, that works the change; and if we are bound to take notice 'of everything that is allowed to affect the validity of any law,' must we not of everything affecting the fundamental as well as the statute law? And judicial notice does not depend on the actual knowledge of the judge or the extent of the personal labor and inquiry required. The justice of the peace in the most remote county in the northwest portion of the state, who may never have seen a copy of the journal of either house, takes judicial notice of all things appearing in either journal, so far as they affect the validity of any law. When challenge is made, he must investigate and know. So, although it may seem extravagant, yet if the legislature has failed to make provision for the canvass of any vote on a proposed constitutional amendment, and if in fact none be made, must not the courts take judicial notice of the actual vote and its result? It may be said if we take judicial notice of votes on one question, why not on all, and what need of elec-

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tion contests? Let the court determine on its judicial knowledge. But we do not take judicial notice of votes and elections as such, but we can take notice of them so far, and only so far, as they affect the validity of some published law. \* \* \*

"The courts are to know what is and what is not a public law of the state; what is and what is not a part of the constitution; and to that end, must take judicial notice of everything, near or remote, that determines such fact. This argument condensed, is this: The courts take judicial notice of what is public law, statutory or constitutional. When a majority of the electors voting on an amendment at an election properly ordered, adopts it, then it becomes a part of the constitution. So the constitution itself says. The courts must judicially know whether such amendment has been adopted, and is in fact a part of the constitution, and to that end, if need be, must take judicial notice of every ballot cast at that election.

"But, second: does not a fair reading, a reasonable construction of the resolution, make it broad enough to appropriate the entire election machinery, including all relating to canvass as well as to casting votes? It says that the proposition 'shall be submitted to the electors of the state for adoption or rejection, at the general election to be held on the Tuesday succeeding,' etc.; and the second section prescribes the form of the ballot. This, as we have just considered, plainly authorizes the vote.

"Does it not also appropriate the whole election machinery?

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“We have a general election law. It is a single statute, yet it covers all details of ordinary elections, names election boards, prescribes rules of election, provides for returns and canvass of all votes \* \* \* it is one election law of the state. It is a general election law. Now, when a proposition is submitted to the people at the general election, without further words or designation, does it not mean that the proposition is to be decided in the manner prescribed by that general election law? It is an old and familiar doctrine that that which is within the spirit of the statute, though not within the letter, is a part of it; as well as that which is not within the spirit but within the letter, is not a part of it. \* \* \* If \* \* \* it should be stated that a question has been submitted to the electors at a specific and named election, the universal understanding would be, not only that the votes were to be received, but also that they were to be counted, canvassed, and the result proclaimed; and all this would be implied from the simple statement in reference to the submission. Should not equal extent be given to the language used by the legislature if, without such extent, its intended action fails? Of course, what the legislature omits, the courts cannot supply. But the largest latitude may, and should be given to the language used, in order to uphold, rather than defeat its action. Especially is this true when, otherwise, large interests fully considered, will fail, and more especially is this true, when upon the faith of such legislative action the people of the whole state have been stirred up and moved to express their judgment

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upon a matter understood to be before them for decision. \* \* \* Nearly two years elapsed between the time the proposition passed the legislature and the day of the popular vote. During this time this question was not forgotten. It was discussed in every household and at every meeting. The state was thoroughly canvassed; its merits and demerits were presented and supported by all possible arguments. Pulpit, press and platform were full of it. It was assumed on all sides that the question was before the people for decision. There was not even a suggestion of any such defect in the form of submission as would defeat the popular decision. \* \* \* But there was not a suggestion from friend or foe. The contest was warm and active. After the contest was ended and the election over, the claim is for the first time made that after all there was nothing in fact before the people; that this whole canvass, excitement and struggle was simply a stupendous farce, meaning nothing, accomplishing nothing. This is a government of the people, by the people, and for the people. This court has again and again recognized the doctrine lying at the foundation of popular governments, that in elections the will of the majority controls, and that mere irregularities or informalities in the conduct of an election are impotent to thwart the expressed will of such majority."

The Ohio home-rule amendment in question reads as follows:

"No law shall be passed or be in effect prohibiting the sale, furnishing or giving away of intoxicating liquors operative in a subdivision of the state

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upon the option of the electors thereof, or upon any other contingency which has force within a territory larger than a municipal corporation or a township outside of municipal corporations therein. All laws in contravention of the foregoing are hereby repealed.

“Nor shall any law hereafter be passed prohibiting the sale, furnishing or giving away of intoxicating liquors throughout the state at large.”

Now, as to the second contention of plaintiff in error, that said “home-rule amendment” is contrary to the federal constitution, or, to use the language of plaintiff in error, a violation of the “Federal Compact.” Plaintiff in error does not attempt to specify any particular article, section or provision of the federal constitution which he claims nullifies this amendment. He contends, however, that it is a violation of the general-welfare clause of the preamble of the federal constitution. That preamble reads as follows:

“We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, *promote the general Welfare*, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

The brief of plaintiff in error exhibits unusual research of cases and authorities to sustain his contention, but we are unable to find a single citation or authority which would authorize any court to declare any statute or provision of any state constitution invalid because the same was held con-



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trary and repugnant to the preamble of the federal constitution. The preamble of the federal constitution merely states the great cardinal purposes of government. It has been held again and again that it is not a grant or delegation of power, but merely a generic statement of the great aims and ends of our national government.

Chief Justice Fuller in *Yazoo & Mississippi Valley Rd. Co. v. Thomas*, 132 U. S., 174, 188, says:

"The preamble is no part of the act, and can not enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous."

Judge Story, in his work on the Constitution (5 ed.), Vol. 1, Section 462, uses this language:

"The preamble never can be resorted to to enlarge the powers confided to the general government or any of its departments. It cannot confer any power *per se*; it can never amount, by implication, to an enlargement of any power expressly given. \* \* \* Its true office is to expound the nature and extent and application of the powers actually conferred by the constitution, and not substantively to create them."

Watson in his excellent work on the Constitution, Volume 1, page 92, and following, exhaustively discusses this phase of the subject and the authorities are collected to sustain this doctrine. We quote one more, *Jacobson v. Massachusetts*, 197 U. S., 11, 22:

"Although that preamble indicates the general purposes for which the people ordained and established the constitution, it has never been regarded as the source of any substantive power conferred

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on the government of the United States or on any of its departments. Such powers embrace only those expressly granted in the body of the constitution, and such as may be implied from those so granted. Although, therefore, one of the declared objects of the constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States unless, *apart from the preamble*, it be found in some express delegation of power or in some power to be properly implied therefrom."

Therefore, inasmuch as we have no delegation or denial of power in the preamble, how can it be said that any exercise of governmental power by the state by virtue of its state constitution can be violative of any grant of power or denial of power in the preamble of the federal constitution? But it may be claimed that if a state constitutional provision cannot be held invalid or contrary to the federal constitution because of the provisions of the preamble to that federal constitution, yet the spirit of that preamble pervades all the provisions of the federal constitution, and therefore the proposed "home-rule amendment" is violative of that spirit and therefore unconstitutional.

The federal constitution is a delegation or denial of powers. This is clear from various provisions, but especially Article X of the Constitution, which reads:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the

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States, are reserved to the States respectively, or to the people."

In substance the same is true of our state constitution. It is a statement of delegated or denied powers to each branch of the government and to the various departments and subdivisions thereof. This appears in various parts of the constitution and the various amendments thereto, but is directly specified in Section 20 of Article I, which reads:

"This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein *delegated*, remain with the people."

Cooley discusses the doctrine of violating the spirit of the constitution as follows:

"We have elsewhere expressed the opinion that a statute cannot be declared void on the ground solely that it is repugnant to a supposed general intent or spirit which it is thought pervades or lies concealed in the constitution, but wholly unexpressed, or because, in the opinion of the court, it violates fundamental rights or principles, if it was passed in the exercise of a power which the constitution confers. Still less will the injustice of a constitutional provision authorize the courts to disregard it, or indirectly to annul it by construing it away. It is quite possible that the *people may, under the influence of temporary prejudice, or a mistaken view of public policy, incorporate provisions in their charter of government, infringing upon the proper rights of individual citizens or upon principles which ought ever to be regarded as sacred and fundamental in republican government; \* \* \** The remedy

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*for such injustice must be found in the action of the people themselves, through an amendment of their work when better counsels prevail. Such provisions, when free from doubt, must receive the same construction as any other."* Cooley's Const. Lim. (7 ed.), 108.

To same effect is the following:

"Nor are the courts at liberty to declare an act void, because in their opinion it is opposed to a spirit supposed to pervade the constitution, but not expressed in words. 'When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation under the notion of having discovered something in the spirit of the constitution which is not even mentioned in the instrument.'" Cooley's Const. Lim. (7 ed.), 239-240; and a large number of cases there cited.

If it be true that all political power is inherent in the people and the powers specified in the constitution are a delegation or denial of power to the legislative branch, judicial branch or executive branch of the government, or any subdivision thereof, then it must follow that such delegation or denial with all their limitations are absolutely obligatory upon the people of the state, no less than upon the officers of the state, so long as such provisions remain a part of the constitution of the state. The remedy is not to amend or to nullify by legislative act or judicial decree, but by further amendment to the constitution in the way provided by law.

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Numerous cases can be found in which the state has undertaken, through its constitution and by its legislative acts, to arbitrarily, radically and drastically exercise its police power, which courts have held again and again to be a violation of the personal rights and property rights guaranteed by the federal constitution. But we have been cited to no authority in which the state undertook not to enlarge but to diminish the exercise of its police power in which such action has been held contrary to the provisions of the federal constitution. If the state had adopted the prohibition or "dry" amendment, which was submitted on the same day, that would clearly be an enlargement of the police power of the state. Cases in large number are available to show that that enlargement of the police power has been contended as a violation of the federal constitution, but both state and federal courts have uniformly held that it was not such. If that be true as to a dry amendment, which enlarges the police power, it is difficult to comprehend why it is not also true when the state seeks to diminish that police power, as is claimed under the "home-rule" amendment. The people are the masters of their legislature and of every other branch of the government. In a matter involving exclusively state functions they may say in their organic law what the legislature may enact and what they may not enact, and a denial to a legislature of such a right, or what otherwise might be such a right, to pass certain laws cannot be made the basis of a valid claim that such denial is a violation of any right which the people of the state may have under the

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federal constitution. As the constitution is above the legislature, so the people are above the constitution, subject to it and all its parts while it is in force, but possessed of the undoubted right to change, alter or amend it at their own will in any of the regular ways provided by constitution or laws.

The judgment of the court of appeals is, therefore, affirmed.

*Judgment affirmed.*

NICHOLS, C. J., JOHNSON, DONAHUE, NEWMAN,  
JONES and MATTHIAS, JJ., concur.

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HAYNES *v.* JONES.  
MYERS *v.* JONES.

*Canals and reservoirs—Entry and occupation of land by state—Constitutes appropriation under act of February 4, 1825 (23 O. L., 56), when—Rights of original owners—Fee simple title in state, when—No adverse possession against state—Effect of act of congress of May 24, 1828 (4 Stats. at Large, 306; 8 U. S. Laws, 119)—Fee simple title of state in borrow-pits.*

1. The entry and occupation of land by the state of Ohio for canal purposes under authority of the act of February 4, 1825, and the exercise of open and notorious acts of ownership thereon and thereover, in and about the construction of the canal system of the state, was an appropriation of such land for canal purposes within the meaning of that act, and entitled the original owner thereof to demand and obtain compensation therefor from the state.
2. Under the act of February 4, 1825, the fee simple title of all lands appropriated by the state for canal purposes vested in the state of Ohio.

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3. No adverse occupation and user of land belonging to the state of Ohio, however long continued, can divest the title of the state in and to such lands.
4. The fifth and sixth sections of the act of congress of May 24, 1828, granting lands to the state of Ohio for the purpose of aiding the state in the construction and maintenance of canals, operated as a present grant, requiring only the selection and identity of the lands to become a perfect estate in fee simple in the state of Ohio.
5. Where under authority of this act of congress the state of Ohio selected lands for canal purposes, entered thereon and exercised acts of ownership over the same, and evidenced the boundaries of the land selected by it, by open and obvious change of the surface levels incident to the digging and removing of earth and soil therefrom and constructing embankments thereon, the fee simple title of the state became vested and absolute in and to the land so selected as against its grantor, the United States, and all persons claiming thereunder.

(Nos. 14442 and 14443—Decided January 26, 1915.)

## ERROR to Court of Appeals of Licking county.

Isaac Jones filed his petition in the common pleas court of Licking county, Ohio, against James T. Haynes, averring that he is the owner of certain lands described in his petition, that the defendant Haynes claims the right to the use and occupancy of said real estate and is about to enter and erect buildings thereon under and by virtue of a lease of said premises made, executed and delivered to him by the state of Ohio, that the state of Ohio has no right, title or interest in said premises, and prays that an injunction may issue restraining defendant from taking possession thereof and erecting buildings thereon and for a decree quieting the title and possession of plaintiff in and to said real estate as

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against any claim of the defendant thereto. To this petition the defendant filed an answer and cross-petition, admitting that he claimed a leasehold estate in said premises under a lease from the state of Ohio, who then was and still is the owner in fee of said premises, and that he is in possession and entitled by authority of said lease to the use of said land for and during the term of said lease for the purposes therein mentioned, denies that said plaintiff is owner or in possession of said realty or any part thereof, and prays that his title be quieted thereto.

The land in question is the land occupied by the embankment and borrow-pits adjacent thereto on the north side of the Licking-Summit Reservoir, now known as Buckeye Lake, which reservoir was at the time the embankment was constructed a part of the canal system of the state.

The common pleas court found against the plaintiff and in favor of the defendant in error, and quieted his title to this land. Upon appeal the court of appeals found for the plaintiff, dismissed the cross-petition of the defendant and quieted the title of the plaintiff in and to all the lands described in his petition that defendant claimed to hold under a lease from the state, subject, however, to the easement of the state in that portion of the lands actually occupied by the embankment to maintain the same thereon.

This proceeding in error is prosecuted to reverse the judgment of the court of appeals.



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The case of WILLIAM P. MYERS *v.* ISAAC JONES is similar in all respects and presents the same questions.

*Messrs. Flory & Flory*, for plaintiffs in error.

*Mr. Timothy S. Hogan*, attorney general, and *Mr. N. J. Weisend*, for the state of Ohio.

*Messrs. Kibler & Kibler*, for defendant in error.

BY THE COURT. It is conceded by counsel for defendant in error that the state of Ohio did enter upon and appropriate for canal purposes that portion of the land described in plaintiff's petition that is actually occupied by the embankment on the north side of the Licking-Summit Reservoir, now known as Buckeye Lake. That being true, the fee simple title to the land so appropriated vested by force of the statute of February 4, 1825, in the state of Ohio, and the title of the state could not be divested by any adverse possession by adjoining proprietors. Therefore the finding and judgment of the court of appeals that the fee of this land occupied by the embankment is in the defendant in error, subject only to the easement of the state to maintain its embankment thereon and thereover, is erroneous, and to that extent must be reversed. It is now the claim of the defendant in error that no such selection, entry or appropriation was made of the land adjoining this embankment and included within the borrow-pit as would vest the title in the state. Upon this question there is no conflict of evidence. It is conceded that the state entered

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upon this land and dug and removed the soil and earth therefrom for the purpose of constructing the embankments on the north and west sides of this reservoir. It is shown by the uncontradicted evidence in this record that the extent of the material taken therefrom would average one hundred feet wide and three feet deep. This borrow-pit, however, is not regular in its width and depth. The inner line is regular in that it conforms to the outer slope of the embankment, regardless of the course of the embankment, throughout its length. In some places the borrow-pit is wider and the excavation deeper than in others, but throughout its whole course the borrow-pit is well defined by the depression caused by digging the soil and earth therefrom for the purpose of constructing the embankment. This depression or borrow-pit, since the construction of the embankment, has been used as a channel to carry off the water seeping through and overflowing the embankment. The state of Ohio has several times caused this embankment to be cut, when the waters were so high in the reservoir as to threaten its destruction, to permit the surplus water to run through the cut so made in the embankment into and through the channel of the borrow-pit to natural outlets. The term borrow-pit has a well-defined meaning in the science of civil engineering. It means a pit adjacent to a fill or embankment from which material is taken for the purpose of making the fill or constructing and maintaining the embankment. It is not the same as the procuring of material from remote places and hauling it to the improvement. On the contrary, it is an appro-

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priation of the land itself adjacent to the improvement and for the purposes of the improvement. The entry of the state upon the land occupied by this borrow-pit was not of a temporary or uncertain character. Nor was it merely here and there at certain points. It was along the entire course of the embankment immediately adjacent to it and absolutely necessary not only for its construction but for its maintenance and equally necessary for drainage purposes at all times since the construction of this embankment.

There can be no doubt whatever that the entry, use, occupation and the destruction of this land for agricultural purposes by the state, was an appropriation of it within the meaning of the act of February 4, 1825 (23 O. L., 56). Nor can it be doubted that the original owner of this land was then and there entitled under the provisions of that act to full compensation therefor. Certainly the state could not have defended against a claim for compensation upon the theory that its acts, use and occupation of this land and the purposes to which it was put did not constitute an appropriation within the contemplation of the law authorizing it to appropriate land for canal purposes. That being true, the fee simple title, by the terms of the statute authorizing the appropriation, vested in the state of Ohio, and having so vested that title could not be divested by any adverse user by an adjoining proprietor. In this particular instance the land occupied by the embankment and borrow-pit belonged at the time of the appropriation to the United States. In 1828 the congress of the United States,

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for the purpose of encouraging the building of canals and reservoirs, gave, granted and ceded to the state of Ohio land belonging to the United States and situated within the state of Ohio that the state might select for canal and reservoir purposes (Sec. 5, 4 Stats. at Large, 306; 8 U. S. Laws, 119). The mere act of selecting and occupying this land by the state of Ohio by authority of the act of congress of 1828 vested the fee simple title to the land so appropriated and selected in the state of Ohio without payment of compensation or damages therefor. No private individual was then interested in any part or parcel of this land. It was solely a question between the state of Ohio and the United States. The fact that in 1842, many years after the state had selected and occupied this land for the purposes named in the act of congress in 1828, the United States government issued a patent deed to the predecessor in title of the defendant in error for the entire quarter section in which this land is situated, could not and does not affect the title of the state thereto. It was held in the case of *Strong v. Lehmer*, 10 Ohio St., 93, that the fifth and sixth sections of the act of congress granting lands to the state of Ohio for the construction of canals, operated as a present grant, requiring only the identity of the lands to be ascertained to become perfect. It was also held in that case that a purchaser who enters land and takes a patent deed, with full knowledge of a selection in fact, cannot in equity hold the land against a grantee of the state, notwithstanding the imperfect execution of the power to grant the land vested in the state by

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the act of congress. At the time this patent deed was issued to the predecessor in title of the defendant in error this excavation had been made and the embankment constructed. These were open and obvious acts evidencing that the state had made selection and had appropriated this land for canal purposes. The evidence of the selection was plain and unmistakable and the identity of the land selected beyond question. The patentee could not close his eyes to these conditions. Nor can he now be heard to say that he did not know that which was obvious to the most casual observer. He took under his patent deed from the United States government subject to the title of the state, whatever that title was, and it is apparent that that was a fee simple title of all that portion of the quarter section of land described in the patent that was covered by the waters of the lake and occupied by the embankment and borrow-pit. In other words, the patent deed conveyed to him no more land in that quarter section than the United States government then owned and had the right to convey, and he cannot now rely upon that patent deed to prove his title to land which the United States did not then own and which was then in the open, adverse and exclusive possession of the state of Ohio. The judgment of the court of appeals is reversed and judgment for plaintiff in error.

*Judgment reversed.*

NICHOLS, C. J., JOHNSON, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

DONAHUE, J., not participating.

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ZILCH, A MINOR, BY ETC., *v.* BOMGARDNER.

*Workmen's compensation—Filing first notice and preliminary application—Constitutes application, and bars action against employer, when—Sections 1465-61 and 1465-44, General Code.*

(No. 14653—Decided January 26, 1915.)

ERROR to the Court of Appeals of Cuyahoga county.

*Mr. A. E. Powell* and *Mr. A. L. McGannon*, for plaintiff in error.

*Mr. F. M. Secrest; Mr. Eugene Carlin* and *Mr. James I. Boulger*, assistant attorney general, for defendant in error.

BY THE COURT. Plaintiff in error brought an action in the court of common pleas of Cuyahoga county to recover damages for injuries sustained by him, on June 6, 1913, while in the employ of the defendant in error. The injuries were due to the negligence of the defendant in failing and neglecting to guard a circular saw, as required by Section 1027, General Code, and in his failure to exercise ordinary care in furnishing plaintiff a safe place in which to work. One of the defenses of the defendant was that prior to the time of the injury he had paid into the state insurance fund the premium provided by the workmen's compensation act and was entitled to all the privileges and benefits of the act, and that plaintiff, on or about June 14, 1913, made an application for an award from the state

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liability board of awards for the injuries complained of and thereby waived all right he might have had to exercise his option to institute proceedings in a court for damages for said injuries. Plaintiff filed a reply denying these allegations.

It appears from the record, and it is uncontradicted, that plaintiff, a few days after he received the injuries complained of, made out, signed and sent to the state liability board of awards a paper the caption of which was as follows:

"In the Matter of the Claim of William Zilch for Payment to Him of Money Out of the State Insurance Fund."

Opposite this caption was the following:

"No. 5490. First Notice of Injury and Preliminary Application."

Immediately below the caption and the matter opposite thereto, above quoted, appeared the following:

"I hereby make application to the state liability board of awards for the payment of money out of the state insurance fund on account of the injury to me hereinafter described and hereby request that all forms and blanks necessary for the proper proof of my claim be furnished to me, free of charge."

Then followed certain statements of fact, which included the name of plaintiff, his address, nationality, the name of his employer with his office address and nature of business, the date of the accident, the location of the place where the accident happened, the manner of its happening, the nature of the injury, his inability to work, the time when he would probably be able to perform work, his

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ability to take up regular employment when he did return to work and the name of plaintiff's physician and address. This was signed by plaintiff.

On the back of this blank, which was filled out and signed by plaintiff and sent to the liability board of awards, is a copy of the rules of the board. Rule 4 provides that an employe who has been injured in the course of his employment and who contemplates filing an application for an award, shall, within one week from receiving such injury, notify the board of the time, place and nature of his injury and the name of his employer, and the forms of notice are to be obtained from the employer and mailed to the state board. Rule 7 provides that applications for awards in all cases of injury not resulting in death must be made by the party injured not less than two weeks nor more than three months after the injury is received. Rule 9 provides that in all cases of injury where the preliminary notice provided for by rule 4 has been given, and no application for compensation has been made within the time provided by rule 7, it shall be the duty of the director of claims to notify the injured person by mail of his noncompliance with rule 7, enclosing him a copy thereof, and should no application be filed within two weeks after such notice, the board may consider that such injured person has waived his right to compensation, and make a finding accordingly.

The blanks requested by plaintiff in the paper signed by him were furnished by the state board, but he failed to take any further action in reference to his claim, and at the end of two weeks, after



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notice served upon him, the board found that he had waived his right to compensation and made its finding accordingly.

These facts in reference to the dealings of plaintiff with the state liability board of awards appearing upon the trial of the case, the defendant moved that the cause be withdrawn from the jury and that a judgment be rendered in his favor. This motion was overruled, the case was submitted to the jury and a verdict was rendered in favor of plaintiff and judgment entered thereon.

The court of appeals reversed this judgment upon the ground that plaintiff, when he filed the notice and preliminary application, so called, waived his right to exercise his option to institute proceedings in court, and plaintiff in error asks this court to reverse the judgment of the court of appeals and to affirm the judgment of the court of common pleas.

Section 1465-61, General Code, authorizes a claimant to make a claim for compensation out of the state insurance fund, or institute proceedings in a court for damages on account of his injury, in a case such as the one at bar, where the injury has arisen from a failure of the employer to comply with a statute for the protection of the life or safety of his employe.

In the last paragraph of this section this language is found:

"Every employe, or legal representative in case death results, who makes application for an award from the state liability board of awards, waives his

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right to exercise his option to institute proceedings in any court."

The only question for determination here is whether the "First Notice and Preliminary Application" filed by plaintiff was an application within the meaning of that term as used in Section 1465-61. If it were, then plaintiff could not institute this proceeding in the court of common pleas of Cuyahoga county.

It is the claim of plaintiff in error that the paper signed by him was not an application, but was merely a notice as provided in rule 4 of the state board.

Under the provisions of Section 1465-44, the board is authorized to adopt reasonable and proper rules to govern its procedure and to regulate and provide for the kind and character of notices in cases of accident and injury to employes. While the state board, under the provisions of this section, may make rules, it is not authorized to say that an application is not an application.

The language used in the blank signed by plaintiff in error is plain and unambiguous. It reads:

"I hereby make application to the state liability board of awards for the payment of money out of the state insurance fund on account of the injury to me hereinafter described."

Then follows the request that all forms and blanks necessary for the proper proof of his claim be furnished to him.

Our holding is that this was an application within the meaning of that term as used in Section

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1465-61 and the state liability board of awards was not warranted in holding that plaintiff had waived his right to compensation from the insurance fund in accordance with rule 9. That rule is applicable where a preliminary notice only has been filed. It cannot apply where an application has been made, as was made in the case under consideration. Having made his application for compensation from the insurance fund, plaintiff waived his right to exercise his option to institute a proceeding in court, and his proceeding in the court of common pleas should have been dismissed.

We find no error in the judgment of the court of appeals in reversing the judgment of the court of common pleas and in rendering final judgment for defendant in error.

*Judgment affirmed.*

NICHOLS, C. J., JOHNSON, DONAHUE, NEWMAN, JONES and MATTHIAS, JJ., concur.

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WALSH v. J. R. THOMAS' SONS.

*Partnerships—Fictitious name—Right to maintain action—Section 8104, General Code—Pleading—Noncompliance with Section 8099, General Code—Constitutes defense and defeats action, when—Special findings by jury—Section 11464, General Code—Error for court to explain, when—General and special verdicts.*

1. A partnership, doing business under a fictitious name, may commence or maintain an action under Section 8104, General Code, without alleging compliance with the act requiring registration; noncompliance may be shown as a defense and will defeat the action unless compliance with Section 8099, General Code, be made during its progress.

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2. Upon submission by the court, of a request for a special finding upon a particular question of fact under Section 11463, General Code, it is error for the court to explain to the jury the legal effect of the answer thereto, or to give any instruction, explanation or suggestion that seeks to harmonize the answer with the general verdict or with other special findings submitted for determination.

(No. 14610—Decided February 2, 1915.)

ERROR to the Court of Appeals of Mahoning county.

The defendant in error, under the style of J. R. Thomas' Sons, a partnership, brought an action in the court of common pleas of Mahoning county against the plaintiff in error, Anna Walsh, upon an account in the short form, alleging that it was a partnership, organized and doing business in the state of Ohio; that defendant below was indebted to it for merchandise sold to the defendant and delivered at her request to one Frank Lenderman. A copy of the account is attached to the petition. The defendant admitted that the plaintiff was a partnership, but denied each and every other allegation contained in the petition, and specifically alleged that if any goods were delivered to Frank Lenderman and charged to defendant's account and credit, such was done without the defendant's knowledge or consent.

Prior to the filing of the amended answer the defendant filed a demurrer to the petition, upon the ground that the plaintiff, being a partnership doing business under a fictitious name, was legally incapacitated from bringing the action. The court overruled the demurrer and the trial resulted in a

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judgment for the plaintiff below for the amount claimed, which judgment was affirmed by the court of appeals.

Prior to the introduction of any evidence the defendant below asked for the direction of a verdict in her favor for the same reason contained in a special demurrer — that the plaintiff partnership was suing in the name of J. R. Thomas' Sons and that it had not alleged in the petition that it had complied with the statute relating to registration.

On the trial of the case, in connection with the general verdict, the jury was asked to return a special finding upon the following question: "In the contract or agreement for the sale of the goods, involved in this case, did Anna Walsh agree to pay for the same, if Frank Lenderman did, or would, not?" The jury answered this question in the negative.

*Mr. W. L. Countryman*, for plaintiff in error.

*Mr. Ensign N. Brown*, for defendant in error.

JONES, J. Whether a partnership transacting business under a fictitious name is required to allege in its petition, as a prerequisite for recovery, the fact that it has complied with Section 8099 *et seq.*, General Code, has been variously decided in this state by the lower courts.

Section 8104, General Code, provides that persons doing business as partners contrary to the provisions of the registration statutes, shall not commence or maintain an action until they first file the certificate required therein; but if such partners

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at any time comply with such provisions, they may then commence an action, or if one has been commenced they may maintain it on all such partnership contracts, etc.

This section of the statute does not, in terms, require that the petition must allege compliance with the registration acts. The section denies the right of commencing or maintaining an action to those partnerships only which have neglected to comply with the provisions of registration. Partnerships doing business under fictitious names, which have complied, however, have the right to commence and maintain actions on account of contracts made or transactions had in their partnership name.

The question involved is not so much a question of the right to commence and maintain an action as it is the form of petition upon which such action is based. The want of allegation of compliance was attempted to be reached in this case by special demurrer. Under our code the demurrer challenges only those facts which appear upon the face of the petition. The alleged incapacity in this case does not appear upon the face of the petition, and therefore cannot be reached in the manner attempted. Taking into consideration the entire scope of the act, it would seem that it does not require, as a prerequisite to the bringing of an action of this character, that an allegation of compliance with the registration statute is necessary. Under its provisions any such partnership has the right not only to commence, but to maintain, an action, if it has complied with the provisions named. It will not be presumed in favor of the demurrer that a

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plaintiff partnership has not complied with the terms of the statute, and, by its express provisions, the plaintiff could at any time amend its pleadings to show compliance therewith. Noncompliance with the provisions relating to registration is defensive matter, may be interposed as such, and will defeat the action unless compliance with Section 8099, General Code, be made during the progress of the cause. In this case, on the trial, the plaintiff did in fact offer proof of proper registration.

As developed upon the trial, under the issues joined, the real question was whether primary liability attached and credit was given to the defendant Anna Walsh for the goods delivered to Frank Lenderman; or whether her engagement was collateral and thus within the statute of frauds under a promise to become liable for Lenderman's debt.

An examination of the record shows that the entire testimony was based upon that issue. When the special interrogatory relating to this issue was given to the jury, the court said: "Also in addition to that, you will return what is known in law as a special verdict: 'In the contract or agreement for the sale of the goods, involved in this case, did Anna Walsh agree to pay for the same if Frank Lenderman did, or would, not?' That may be somewhat misleading and let me help you to understand what that means. If on one hand you find that this original contract was made with Mrs. Walsh and they entered into an agreement by which she purchased those goods from J. R. Thomas' Sons and by her assent they gave her credit for it and not Lenderman, then of course this

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answer would be 'no.' It is only when you find, if you shall find from the evidence or fail to find, rather, by the preponderating weight of the evidence, that that was so, which I have just said to you — that this agreement was made between Mrs. Walsh and J. R. Thomas' Sons — will you inquire into the question of whether she made a promise to pay the debt of Lenderman. If she made a promise to pay the debt of Lenderman and the contract was made with Lenderman, and she says 'I will pay for Lenderman if he don't,' she is not liable, as I have said to you. So that, gentlemen, you may take the special verdict and answer it as you find."

Whenever a proper special finding is submitted to the jury upon a controlling, ultimate fact, the statute makes it the imperative duty of the court to submit such question for their determination. The question propounded to them, if answered in the affirmative, would have determined the issues between the parties in favor of the defendant. It was in nowise misleading, as the court stated, and required neither explanation nor comment. Under our code the duty of the court in relation to its instructions to the jury is clear. The province of the court is to apply the law governing the case to the facts produced on the trial, and this is done in the course of its general charge or by special instructions asked to be given by the parties. In connection with special interrogatories it is not proper for the court to explain to the jury what the legal effect of the answer may or may not be. In the instant case the court said to the jury that if they found that the promise of the defendant was to pay for



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Lenderman if he did not, then, in that event, she would not be liable. Thus the court warned the jury what would be the legal effect of its answer, and it could trim its course accordingly. This was error. And there is no reason why the same rule applying to special verdicts under another section of the code should not apply as well to the special findings of fact made by the jury. Explaining the legal effect of answers in cases of special verdicts has been held erroneous in the following cases: *Morrison v. Lee*, 13 N. D., 591, 102 N. W. Rep., 223; *Musbach v. Wisconsin Chair Co.*, 108 Wis., 57.

In this connection the court also directed the jury to answer the question only in the event that they found that there was no agreement between Mrs. Walsh and the plaintiff by reason of which plaintiff gave her credit for the goods. It directed the jury to answer negatively, after it had first determined favorably plaintiff's contention on the issue tendered by it. This is tantamount to saying that if they found for the plaintiff in their general verdict, their answer, to be consistent, must be "no." It was an evident effort on the part of the court to effect consistency between the answer and the general verdict.

Section 11464, General Code, provides: "When a special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court may give judgment accordingly."

The purpose and spirit of this section of the statute were contravened in the effort of the court to harmonize the special findings of the jury with

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the general verdict. The purpose of the section was to give either party in the case the right to demand, uninfluenced by the action of the court, an answer upon a controlling issue without regard to the general verdict. It frequently happens in the trial of a case that the controlling issue of fact thus specially found by the jury may be inconsistent with the general verdict; and to interfere with the province of the jury in this respect, by instruction, explanation, comment or suggestion that would seek to harmonize the answers with the general verdict or with other special findings submitted to them for determination, is clearly erroneous and prejudicial. *Beecher v. Galvin et al.*, 71 Mich., 391.

Complaint is also made as to the misconduct of counsel in his closing argument to the jury upon this point. In discussing the question of the statute of frauds and the special interrogatory propounded to the jury, counsel stated in argument: "It seems to me my friend has been subconsciously trying and purposely trying to befuddle you and get you to think that this question of the statute of frauds is in this case. It ain't. It has nothing to do with this statute. And I say this because he has asked you and the court will instruct you to answer in writing by 'yes' or 'no' a special finding, and the special finding involves only this question of statute of frauds. \* \* \* Now gentlemen I say to you I want you and I think under the evidence you ought to answer that question 'no.' I don't want you to get an idea into your head that this statute of frauds gets into this case for it don't."

The argument of counsel in this connection was

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wholly improper and beyond the field of legitimate argument. While it is proper for counsel to comment upon the facts involved in a special finding, it is improper to impeach the action of the court, by denying that questions propounded are involved in the case, or to caution the jury how the question should be specifically answered. An examination of the record, however, will disclose that opposing counsel did not make any objection at that time. At the close of the entire argument a general objection was made. In view of the fact that the court's attention was not directed at the time to the improper remarks, so that the court might take proper action thereon, this question is not available to plaintiff in error.

The record discloses that the account sued upon was based upon items ranging from September 2, 1911, to July 2, 1912. The reliance of the plaintiff below was based upon testimony tending to show that the defendant, Mrs. Walsh, had pledged her credit as a debtor for an indefinite length of time for goods which were to be delivered to Lenderman. Upon the trial the defendant asked that the following separate written instruction be given to the jury before argument, which the court refused: "If you find from the preponderance of the evidence, that on or about September 30, 1911, the defendant, Anna Walsh, personally or through Frank Lenderman, as her agent, objected to the plaintiff or its representatives, to having the goods delivered to the store of Frank Lenderman, charged to the credit of Anna Walsh, and that she was informed by the plaintiff, or its representatives, that this would no

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longer be done, and if you find further, from the preponderance of the evidence, that the bills for the goods thereafter delivered did not bear the name of the defendant, then the plaintiff cannot recover and your verdict must be for the defendant."

If the testimony tended to develop that, after pledging her credit for the delivery of the goods to Lenderman for an indefinite time, the defendant had cancelled her obligation by notifying the plaintiff not to deliver any more goods under such an agreement, in that event the defendant would not be liable after the time such notice was given. However, the record discloses that there is no testimony upon which this charge could be based. The entire contention of the defendant was that she had made no promise whatever by which she should be charged, and, consistently with this attitude, she offered no testimony which recognized her in any way as the primary debtor. There is no testimony in the record which discloses the fact that either the defendant or any one for her, and with her assent, had notified the plaintiff not to furnish further goods to Lenderman, and there was no error upon the part of the court in refusing to give the special request.

Judgment of the court of appeals will be reversed and the case remanded to the common pleas court for further proceedings according to law.

*Judgment reversed, and cause remanded.*

NICHOLS, C. J., JOHNSON, DONAHUE, NEWMAN  
and MATTHIAS, JJ., concur.

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## MURRAY v. THE STATE, EX REL. NESTOR.

*Municipal corporations—Classification—Section 1, Article XVIII, Constitution 1912, not self-executing—Section 3497 et seq., General Code, constitutional—Transition from one class to another—Federal census controls, when.*

1. Section 1 of Article XVIII of the Constitution, relating to the classification of municipal corporations, adopted September 3, 1912, is not self-executing.
2. Sections 3497, 3498 and 3499, General Code, regulate the method of transition of municipal corporations from one class to the other and are not inconsistent with that constitutional provision.
3. A municipal corporation which had a population of less than five thousand at the last federal census did not advance to a city when it was made to appear by an official census taken by the municipal corporation subsequently thereto that it had a population of more than five thousand.

(No. 14599—Decided February 2, 1915.)

ERROR to the Court of Appeals of Mahoning county.

This was a proceeding in *quo warranto* instituted in the court of appeals of Mahoning county.

On November 6, 1911, the relator, James Nestor, was elected marshal of the village of East Youngstown in the county of Mahoning, for a term of two years, commencing January 1, 1912, and qualified as such marshal and entered upon the discharge of his duties and continued to discharge them during said term of two years and up to January 1, 1914.

As shown by the federal census of 1910, East Youngstown had a population of 4,972. On the 27th, 28th and 29th of October, 1913, a census was

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taken of East Youngstown, by virtue of an ordinance passed by the council thereof under authority of law, and said census so taken showed 7,021 *bona fide* residents within the municipal corporation of East Youngstown. This census was taken for the purpose of ascertaining the number of liquor licenses to be granted in the municipal corporation.

At the election held November 4, 1913, James A. Murray, the respondent, was elected marshal of said municipal corporation. On January 1, 1914, the relator, James Nestor, relinquished his position as marshal and turned over the keys of the office to respondent.

On February 14, 1914, relator filed a petition in *quo warranto* in the court of appeals of Mahoning county claiming that on October 29, 1913, an official census, duly authorized, taken, authenticated and approved in accordance with law, showed the municipal corporation of East Youngstown to have a population of 5,000 and over, to-wit, 7,021; that said municipal corporation became, at and before the expiration of the term of office of the relator, and then was, a city; that by virtue of law the relator was continued in office until succeeded by the properly elected and qualified officer of the city of East Youngstown, at the next regular election, and that no election of officers of said city having been held, the relator was lawfully entitled to exercise the powers and duties of said office until his successor was legally elected and qualified. It was alleged that the respondent, James A. Murray, on January 1, 1914, usurped and intruded into the office and ousted the relator therefrom and unlaw-

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fully held and exercised said office to the exclusion of the relator under claim of having been elected to said office on November 4, 1913. The relator prayed for a judgment of ouster.

The respondent filed an answer consisting of two defenses, the first being a general denial. In the second defense it was averred that the municipal corporation of East Youngstown had a population of less than 5,000 at the last federal census and that by virtue thereof and of the laws of Ohio relating thereto was of the grade of a village and that no steps could be taken under the laws of Ohio until the next federal census to advance said village to the grade of a city. It was further alleged that on November 4, 1913, the respondent was duly elected marshal of the village of East Youngstown; that he had duly qualified and was commissioned as such; that thereafter, by virtue of said legal qualification and commission, he did, on January 1, 1914, enter upon the discharge of the duties of the office of marshal and that he has continued to discharge the duties from that time.

The cause was submitted to the court of appeals upon the petition, the answer and the evidence. The court found, among other things, that the census taken under authority of law in October, 1913, showed 7,021 *bona fide* residents within the municipal corporation of East Youngstown; that by reason of the population being so shown to be 7,021, on October 29, 1913, East Youngstown became a city and was a city on November 4, 1913, when an election was held therein; that by reason thereof the election of the respondent as marshal of the village

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of East Youngstown was void and of no effect and that he was guilty of intruding into the office on January 1, 1914, and unlawfully holding and exercising the same from said date, and that relator, James Nestor, was marshal of the village of East Youngstown when said municipality became a city on October 29, 1913, and has been from said date lawfully entitled to hold and exercise the office until succeeded by his proper successor as provided by law.

There was a judgment against the respondent and he was ousted and excluded from the office, and as plaintiff in error here he seeks a reversal of the judgment of the court of appeals.

*Mr. E. H. Moore; Mr. Charles Koonce, Jr., and Mr. Charles F. Ohl*, for plaintiff in error.

*Mr. David G. Jenkins and Mr. L. O. Casey*, for defendant in error.

NEWMAN, J. Among the powers conferred upon a municipal corporation, the exercise of which may be provided for by council, is the power to take and authenticate a census of the municipality. Section 3625, General Code. Acting under this authority, the council of the village of East Youngstown caused a census to be taken. The same was duly authenticated and showed the population on October 29, 1913, to be 7,021. The purpose of this census, which is unimportant so far as this case is concerned, was to ascertain the number of saloon licenses to be issued in the year, it being provided



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in the liquor-license law that any official census taken within the year next preceding that for which licenses are granted may be a basis in determining the number of licenses. From the record before us it appears that the proceedings had in the taking and authentication of this census were regular and in conformity with law, and it was therefore a legal and official census.

It was the holding of the court of appeals, and it is the contention of counsel for defendant in error, that by reason of the population of East Youngstown being shown by this official census to be 7,021 on October 29, 1913, it became a city on that day and was a city on November 4, 1913, when the election was held therein. If this be true, the election of plaintiff in error as marshal on that date was of no force or effect for the reason that a marshal is not a proper officer of a city.

If Section 1 of Article XVIII of the Constitution, adopted September 3, 1912, effective November 15, 1912, which classifies municipalities into cities and villages, is self-executing so as to change *ipso facto* from a village to a city a municipality which is shown by an official census to have a population of 5,000 or over, then the holding of the court of appeals and the contention of counsel are correct.

Prior to the adoption of this constitutional provision in 1912, the classification of municipalities was in the hands of the legislature. Its classification at times was most complex and special in its nature. In 1902 the abuse of this power of classification had grown to such an extent that this court in *State, ex rel., v. Jones et al.*, 66 Ohio St., 453,

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held that the then existing legislation having to do with the classification of municipalities was invalid and repugnant to the constitutional provision prohibiting the general assembly from passing special acts conferring corporate powers. Immediately following this decision a municipal code was adopted in which municipalities were placed in two classes only, cities and villages. Although the legislature from that time kept within constitutional limitations, yet the constitutional convention of 1912, in order to make it impossible for the legislature to resort to a complex classification and that the classification of municipalities should be limited to cities and villages, placed the matter beyond the power of the legislature and made it a part of the fundamental law of the state. The convention deemed it advisable to adopt the basis of population which had obtained in this state for ten years. The constitutional provision in question reads:

“Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law.”

What is the meaning of the language “the method of transition from one class to the other shall be regulated by law”? Counsel for defendant in error are insistent that “the method of transition” cannot mean the simple fact of a municipal corporation obtaining or losing population; that it must refer to the way by which the operation of the

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law passes from one set of officers to another; to the succession of the officers of one class to the officers of another class; that it does not refer to the method by which the population of the municipal corporation is ascertained, for this, they say, is a fact to be established in any proper or legal way, as are other facts.

It is clear to us that the constitutional convention when it framed this provision, and the people when they adopted it, mindful of the abuse by the legislature of its power of classification, were concerned solely as to classification. The manner of the assignment of the different municipalities to the classes to which they belong they left to be regulated by law. There never had been objection to or criticism of the method used by the legislature in determining the population of a municipality and there was no evil to be corrected in that respect. The federal census had been the test of population, to which no objection successfully has or can be made.

When it came to the framing of the constitutional provision under consideration there was omitted therefrom certain language which had been used in Section 3497, General Code, the statute classifying municipalities. That section is as follows:

“Municipal corporations, which, at the last federal census, had a population of five thousand or more, shall be cities. All other municipal corporations shall be villages. Cities which, at any future federal census, have a population of less than five thousand shall become villages. Villages which,

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at any future federal census, have a population of five thousand or more, shall become cities."

It is to be observed that the words "at the last federal census" do not appear in the constitutional provision, and it is the contention of counsel that this statute is therefore inconsistent and must fall.

As we view it, this language was omitted because it was deemed unimportant by the framers of the constitution how the transition from one class to the other should take place. They were willing to leave this to the legislature. While "the last federal census" had been the test of population for years, yet the method of transition was to be regulated by law. The legislature could use as a basis either the federal census or any official census which it saw fit to adopt.

The method of transition, we think, has reference to the time as well as the manner of transition. Our attention is called to the fact that in this constitutional provision "having" is used, and counsel argue that by this it was intended that whenever it appears by any official census that a municipal corporation has the requisite population, it instantly becomes a city. We cannot give it that interpretation. It is a mere form of expression and has no legal import. The word "are" is used in the first sentence in the provision, and it can be claimed with as much force that by the use of this word the constitutional framers intended a classification of the municipalities of this state but once and for all time.

Counsel cite cases which they claim support their contention. But the constitutional provisions be-

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fore the court in those cases differ from the one here. They do not contain the language "the method of transition from one class to the other shall be regulated by law," or any language which authorizes action on the part of the legislature. For example, the constitution of California, Section 8, Article XI, read:

"Any city containing a population of more than one hundred thousand inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of this state."

In *People v. Hoge*, 55 Cal., 612, it was held that legislative action was not necessary to enable the inhabitants of a certain city to act under this provision in the matter of framing a charter, but the court in that case called attention to the fact that the constitution nowhere provided either expressly or by implication for such legislative interference.

Section 3498, General Code, provides:

"When the result of any future federal census is officially made known to the secretary of state, he forthwith shall issue a proclamation, stating the names of all municipal corporations having a population of five thousand or more, and the names of all municipal corporations having a population of less than five thousand, together with the population of all such corporations. A copy of the proclamation shall forthwith be sent to the mayor of each municipal corporation, which copy shall forthwith be transmitted to council, read therein and made a part of the records thereof. From and after thirty days after the issuance of such proclamation each municipal corporation shall be a city or vil-

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lage, in accordance with the provisions of this title."

Then follows Section 3499, which provides that officers of a village advanced to a city, or of a city reduced to a village, shall continue in office until succeeded by the proper officers of the municipal corporation elected at the next regular election, and the ordinances thereof not inconsistent with the laws relating to the municipal corporation shall continue in force until amended or repealed.

It is under this last section that the defendant in error claimed the right to continue in office, the village of East Youngstown having been advanced to a city, according to his contention, when the population was shown by the census of October 29, 1913, to be more than 5,000. But we hold that Sections 3497 and 3498 are not inconsistent with the constitutional provision under consideration. They were in force when this provision took effect and will continue in force until amended or repealed. This is true under the doctrine announced in *Cass v. Dillon*, 2 Ohio St., 607, and again under the schedule to the constitutional amendments of 1912, which, after fixing the time when the amendments adopted shall be effective, provides that all laws then in force not inconsistent therewith shall continue in force until amended or repealed.

If these statutes are repealed they are repealed by implication, which repeals are not favored. As held in *The State v. Cameron et al.*, 89 Ohio St., 214, before a statute is so repealed the repugnancy must be necessary and obvious, and if by any

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fair course of reasoning the law and constitution can be reconciled the law must stand.

Our conclusion is that Section 1, Article XVIII, of the Constitution is not self-executing. It indicates a basis of classification, but the time and manner of the transition of a municipal corporation from one class to the other is to be regulated by law.

There are then in the General Code these statutes which regulate the transition of municipalities from one class to the other. Applying them here, the municipal corporation of East Youngstown, according to the federal census of 1910, was a village. This will be its status until it appears from a federal census that it has a population of 5,000 or more and the result of such federal census has been officially made known by the secretary of state and such steps taken as are required by Section 3498, unless under the authority conferred upon it by the constitutional provision the general assembly sees fit to change the method of transition.

Counsel for plaintiff in error challenge the judgment of the court of appeals upon the further ground that the relator relinquished possession of the office of marshal and turned over the keys to the respondent; that from January 1, 1914, the relator never undertook to exercise or perform any duties of the office and that up until the time the petition was filed in the case he made no demand in regard to performing the duties of the office. In view of our holding on the other branch of the case it becomes unnecessary to pass upon this proposition.

## Syllabus.

For the reasons we have given the judgment of the court of appeals is reversed, and upon the conceded facts in the case judgment is rendered for plaintiff in error.

*Judgment reversed and judgment for plaintiff in error.*

NICHOLS, C. J., JOHNSON and WANAMAKER, JJ., concur.

DONAHUE, J., concurs in the first and third propositions of the syllabus and in the judgment, but dissents from the second proposition of the syllabus.

JONES and MATTHIAS, JJ., dissent from the second and third propositions of the syllabus and from the judgment.

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THE HOCKING VALLEY RAILWAY CO. *v.*  
HELBER, ADMR.

*Negligence—Two proximate causes—Bridge accident—Liability controlled by duty to maintain bridge—Railroad to maintain guardrails, when—Jury entitled to pleadings, when—Pleadings as evidence—May be used by adverse party, when.*

1. Where two causes combine to produce an injury to an occupant of a vehicle passing over a bridge in a public road, both of which are in their nature proximate, the one being a culpable defect in the bridge and the other an occurrence as to which neither party was at fault, those whose duty it was to maintain the bridge in a reasonably safe condition will be liable to the injured person.



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2. About thirty years prior to the injury complained of the defendant railroad company or its predecessor in title made a cut in, under and through a public highway and erected a bridge therein over the cut and over its railroad; the company thereafter and until the date of the injury maintained the bridge: *Held*, Under the state of facts, it was the duty of the company to make every reasonable provision for the safety of the public in the construction and maintenance of the bridge. To this end it was its duty to erect and maintain reasonably substantial guardrails on the bridge to serve as a protection to life and property.
3. It is proper for a court to send the pleadings in a cause to the jury during its deliberations, but the pleading of a party is not admissible in evidence on the trial to prove its allegations. A pleading of one party may be introduced by his adversary to prove admissions or to impeach statements made on the trial.

(No. 14459—Decided February 2, 1915.)

ERROR to the Court of Appeals of Hocking county.

This was a proceeding brought by the defendant in error against the railway company to recover damages for wrongfully causing the death of plaintiff's decedent.

The second amended petition, after alleging the qualification of the plaintiff and the incorporation and purposes of the defendant, avers that the defendant owns and operates a railroad running from Toledo to Athens, Ohio; that it also owns and operates a branch, known as The River Division Branch, extending southeasterly to Pomeroy, Ohio; that it or its predecessors in title built and constructed said river division, and in the construction of the roadbed thereof made a cut about 25 feet in

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depth and about 200 feet in length at or near the residence of one Bates, in Green township, Hocking county, and through and under a public highway known as the Nickel Plate road in said county, which said public highway had been used by the general traveling public prior to said date and now is and ever since has been a public highway used by the general traveling public; that defendant or its predecessors in title caused a bridge to be constructed above, over and across said cut and the roadbed of said branch railway upon and in said Nickel Plate highway, which said highway is a county road, and that said bridge was constructed on said highway at or near the residence of said Bates aforesaid; that said bridge was and is about 52 feet in length and about 11 feet 7 inches in width; that the floor of said bridge is about 23 feet above the top of said branch railway; that the bridge, when constructed by said defendant or its predecessors, was, always has been and still is about 3 feet higher than said public highway originally was on both the east and west sides of the same; that beneath or under said bridge, extending about 50 feet in distance on the north side thereof and about 150 feet on the south side thereof from the center thereof, said cut or roadbed was made; that said bridge was constructed on four wooden frame bents, perpendicular in form; that said bridge was constructed on what is known as the skeleton plan and resembles in form three sides of an octagon; that there was placed upon both the north and south sides of said bridge a frail, weak and unsubstantial railing or banister about 52 feet in length; that

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about 17 feet in length of the west portion of said bridge was, and for many years prior to said date had been and now is, extremely and unreasonably steep and at a grade of more than ten per cent.; that the west grade or approach to said bridge is likewise extremely and unreasonably abrupt, narrow and steep and difficult of ascent; that on and prior to the 30th of July, 1911, said bridge was defectively constructed in the following particulars: The width thereof was narrower than the usual and ordinary bridge used in said county in the public highways thereof over public places of like character, and was by reason thereof dangerous and unsafe to the general traveling public in the use thereof; that on said day and for many years prior thereto the railing or banister upon or along the south side of said bridge was weak, wobbly, frail and unsubstantial throughout the entire length of said bridge; that the wood thereof was old, weatherworn, brittle and partially decayed and rotten; that one of the upright pieces of said railing or banister, located about 17 feet from the southwest corner of said bridge and upon the same and on the south side thereof, was attached by spikes, which had become loose by reason of age, long-continued use, the rotten and decayed condition of the railing or top thereof and by reason of the inferior quality of the timber from which it was made; that said upright, in being attached to the sill of said bridge, passed through a mortise made near the end of a large plank in the floor of the bridge before being attached to said sill, which mortise had decayed and rotted away; that said

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upright piece on said date and from the time of its attachment to said sill on the south side of said bridge had been reduced in size at the place of attachment so that it was only about  $1\frac{7}{8}$  inches in thickness and was weak, frail, brash, weatherworn and doty; that said railing along the entire length of the south side of said bridge was not substantially braced and especially said upright piece was wholly unsubstantial and unsupported, nor was it braced in any manner; that said bridge on said day and for many years prior thereto had been out of repair, dangerous and unsafe for use to the traveling public, as aforesaid, of which the defendant had full knowledge, or ought to have known by the use of ordinary care; that the construction and maintenance of said bridge cost greatly in excess of \$50; that on said day the plaintiff, in company with his wife, decedent, and their two children, was driving along said Nickel Plate highway in a two-seated, one-horse surrey, in an easterly direction, in a lawful manner towards said bridge and on the same, and without fault upon the part of either of them, and without neglecting any duty and being wholly ignorant of the defective condition of said bridge and banister, said horse, while drawing said conveyance with its occupants over said approach to said bridge and upon and over said bridge, suddenly fell upon said bridge and against said banister, on the south side thereof, at a point about 17 feet east of the southwest corner of said bridge, and that by reason of said defects, as aforesaid—the negligence and carelessness of the defendant in

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constructing and maintaining said bridge and banister, its failure to keep said bridge in repair, the steepness and abruptness of the said west portion of said bridge and the approach thereto, the narrowness of said bridge and the frailty and weakness of said banister and upright piece — said banister gave way, broke down and precipitated said horse, vehicle and occupants to the ground and said branch railway below, a distance of about 25 feet, inflicting injuries upon the decedent from which she died. Plaintiff claimed damages in the sum of \$10,000.

A demurrer filed by the defendant to the above second amended petition was overruled by the court.

The defendant in its answer to the second amended petition, after admitting the qualification of the plaintiff and the allegations as to the beneficiaries, admitted the incorporation of the defendant and its ownership and operation of the roads as alleged, the making of the cut on the Nickel Plate highway, that said highway has been used by the general public as averred, the construction of the bridge at the point and of the dimensions stated; that it cost more than \$50; that on July 30, 1911, the plaintiff with his wife and children was traveling over said highway in a two-horse surrey in a lawful manner towards and upon said bridge; that the horse fell upon said bridge and against the banister on the south side thereof at a point about 17 feet east of the southwest corner of said bridge; that said banister was broken; that said horse, vehicle and occupants fell to the ground upon said

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branch railway below said bridge; that as a result of injuries received thereby the decedent died, and the defendant denied all the other allegations of the second amended petition.

For a second defense the answer averred that at and long prior to the said 30th of July, 1911, it exercised ordinary and proper care to keep said bridge and the railings or banisters along the sides thereof in a safe, suitable and proper condition for all usual and ordinary modes of travel and for transportation of persons, vehicles and property over said bridge; that the plaintiff and said decedent were then, and for a long time prior thereto had been, familiar with said bridge and the construction and design thereof and the approaches thereto; that on said date the horse referred to, weighing about 1,200 pounds, driven by said parties, as he was pulling said wagon up to and on said bridge, became choked because of the fact that said parties had put on him a collar which was too small and that solely by reason of the aforesaid, as said horse was ascending the grade towards said bridge and when he was upon the same, he staggered and fell with great force, throwing his entire weight upon and against the railing on the south side of said bridge; that said railing was not intended to be subjected to such an unusual and extraordinary burden or weight, as said plaintiff and his wife well knew; that solely by reason of the aforesaid the railing was broken; that the accident mentioned in the plaintiff's second amended petition and the injuries therein described resulted proximately from and solely because of the

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aforesaid; that at said time said railing on said bridge was of good repair and sufficiently strong to withstand all ordinary and usual and proper uses for which it was intended; that the design of said bridge was proper and correct and one generally approved and followed.

The plaintiff thereafter filed an amendment to the second amended petition, in which it is alleged that at and prior to the date of the building of the bridge referred to, said highway was in good repair and was 30 feet wide and safe for the public to travel over and upon the same with their horses and carriages without injury to themselves or their property; that ever since said date the defendant and its predecessors in title failed, refused and neglected to restore said highway to a safe and efficient highway, have failed and neglected to maintain said bridge in such a condition as to render it a safe and proper highway as required by law and have greatly impaired the usefulness of said highway at such point, and prayed as in his petition.

The answer of the defendant to this amendment was a general denial.

A reply containing a general denial to the new matter in the answers having been filed, the case was tried to a jury, which returned a verdict in favor of the plaintiff. From the judgment entered upon this verdict error was prosecuted to the court of appeals, by which it was affirmed.

This proceeding is brought to reverse the judgments of the courts below.

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*Messrs. Wilson & Rector; Mr. C. V. Wright and Mr. F. C. Amos*, for plaintiff in error.

*Mr. Edwin D. Ricketts and Mr. John C. Pettit*, for defendant in error.

JOHNSON, J. The first ground upon which the judgment is attacked is that the demurrer to the second amended petition should have been sustained. It will be observed that the averments of this pleading show that the cut in the public road was made and the bridge constructed by the railroad company about thirty years prior to the date of the accident. The bridge was erected long prior to the passage of the statutes regulating the construction of railroads across highways, above or below grade, and providing for the rights and duties of the company with reference to them. During this period the company and its predecessor maintained the bridge.

Plaintiff in error urges that the case of *Comrs. of Hardin County v. Coffman, Admx.*, 60 Ohio St., 527, declares the principle which should control here. In that case it is held that the commissioners are bound to the exercise of ordinary care to keep the bridges under their control in a safe condition for all usual and ordinary modes of travel and transportation of property over them; but that ordinary care does not require them to anticipate that a bridge will be used in an unusual and extraordinary manner, or be subjected to an unusual or extraordinary burden involving peculiar danger, nor are they liable for an injury



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resulting from such use. In the case referred to the bridge was broken down by a traction engine which was propelled over it by steam and which was drawing a water tank upon which the deceased was riding. It was held that the use was unusual and not such as the commissioners were required to anticipate. In this case the allegations of the pleading in question are to the effect that the plaintiff and his family were traveling in the usual and ordinary mode and that the accident happened by reason of the defects in the structure, which are specifically set forth. We cannot agree with the contention that the petition shows that the coming in contact by the horse with the banister was so unusual or extraordinary as not to be anticipated.

When the defendant company, or its predecessor, found that it was necessary and, therefore, determined to construct a bridge over the cut which it made in and under the Nickel Plate road, as averred in the amended petition, and undertook to maintain it, it was its duty to erect a bridge and approaches which were reasonably safe for the transportation of persons and vehicles over them and to keep them in a safe condition for all the usual and ordinary modes of travel. It being alleged that these duties were not complied with and that the injury to plaintiff's decedent was caused by the failure of the defendant in that behalf, it follows that the demurrer to that pleading was properly overruled.

It is also contended by the plaintiff in error that the trial court erred in overruling its motion at the conclusion of the plaintiff's evidence, and at the

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conclusion of all of the evidence, to direct a verdict in its favor. It is argued in support of this contention that even if it were shown by the weight of the evidence that the defects in the bridge and the banister existed as alleged, still sufficient appeared from the testimony to show that these defects were not the proximate cause of the injury, but that the fall of the horse was such cause. It is said that if Helber's horse had not fallen against the banister the injury would not have occurred.

Authorities are cited in the briefs of counsel on the familiar question as to what constitutes proximate cause. There is no substantial difference between them, and it may be said generally that the proximate cause of a result is that which in a natural and continued sequence produces the result and without which it would not have happened. The fact that some other cause operated with the negligence of a defendant in producing an injury does not relieve him from liability, where such other cause would not have produced the injury but for the defendant's negligence. The court in its charge fairly gave to the jury the rule which should govern them in the disposition of that question.

The issues of fact were determined by the jury whose finding has been affirmed by the courts below. It is sufficient here to say that there was substantial testimony tending to show that the banister was weak, rotten and wabby, and had been for several years; that the railroad company had been requested to put in new guardrails; that

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the horse was properly hitched, carefully driven and sure-footed. The testimony of Mr. Helber was that "not much of the weight of the horse hit the banister" at the time it gave way and by reason of which the deceased lost her life.

It is contended by the plaintiff in error substantially that the railing or banister of a bridge is constructed as a guide and reasonable protection to prevent one traveling over the bridge from driving off the sides. We think that the duty of the railroad company in the circumstances of this case is not so limited. The company had, on its own initiative, erected and maintained this bridge as a substitute for a safe and convenient wagon road which had been previously provided for the public use. When it did so, it was under the obligation to make every reasonable provision for the safety of the public. To this end, it would seem to be clear that, when the defendant erected the bridge in question, under the circumstances set forth, it was its duty to erect and maintain substantial rails or banisters thereon, and if the injury resulted from a defective banister this was the proximate cause notwithstanding the fact that there may have been some preliminary stumbling of the horse, by reason of which he came in contact with the defective banister, provided the jury believed that such contact was of the character and occurred in the manner described by plaintiff and that plaintiff's decedent was without fault.

In *Walrod v. Webster County*, 110 Ia., 349, the plaintiff was thrown from a bridge and injured. Railings were erected on both sides of the ap-

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proach, which, in consequence of neglect and the action of the elements, were out of repair and insecure. One of the horses became frightened at a flash of lightning, settled back in the harness and was pushed by the other horse against the defective railing, which gave way. It was held that an instruction that if the accident would not have happened if there had been a proper railing on the bridge, then the defective railing was the proximate cause of the injury, but that if the accident would have happened had the railing been sufficient, then the railing was not the proximate cause of the injury, and plaintiff could not recover, was proper. The court say: "Or as stated in *Gould v. Schermer*, 101 Iowa, 582: 'The mere fact that some other cause operates with the negligence of the defendant to produce the injury does not relieve the defendant from liability. His original wrong concurring with some other cause, and both operating proximately at the same time in producing the injury, makes him liable, whether the other cause was one for which the defendant was responsible or not.' " Among the authorities sustaining this rule are *Hey v. Philadelphia*, 81 Pa., 44, 50; *Ring v. City of Cohoes*, 77 N. Y., 83; *Simons v. Tp. of Casco*, 105 Mich., 588; and *Palmer v. Andover*, 2 Cush., 600.

In *Faulk v. Iowa County*, 103 Ia., 442, it is said: "While the corporation should not be held responsible for the failure to provide a railing which would successfully withstand all pressure which could be applied by such means, yet it may well be held liable for the failure to provide against

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the pressure which the jury may rightly have found was applied in this case. In other words, the occurrence in question was not of such an unusual character that it was not the duty of the defendant to provide against it."

In *Hendry v. North Hampton*, 72 N. H., 351, 353, it is said: "The contention of the defendants, that because the hole in the road gave to the plaintiff the impetus which carried her over the unrailed and dangerous embankment, therefore the hole—not the unrailed embankment—was as a matter of law the cause of her injury, is best answered by the authorities, which are so conclusive against the defendant's contention, at least in this jurisdiction, that to enter upon a discussion of the question would be a work of supererogation."

In *Ivory v. Town of Deerpark*, 116 N. Y., 476, the cause of the plaintiff's complaint was that the defendant failed to provide any barrier along the highway at the place of the accident for the protection of travel. The defendant claimed that the absence of the barrier was not the proximate cause of the injury and that this cause was that the horses were beyond the control of the plaintiff. The court held that there was no error in the refusal of the court to charge that unless the jury could say from the evidence that the accident would have occurred had the horses been going at an ordinary rate of speed or were under control, the defendant was entitled to a verdict, while in case the horses were beyond the control of the plaintiff such fact may have been the proximate

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cause of the injury, it did not, provided the plaintiff was free from fault, relieve the defendant from liability for the injury to the plaintiff as a consequent result from the negligence of the defendant. In that case there would be two proximate causes of the accident and the responsibility would rest with the defendant if one of such causes was attributable to the fault of the commissioners.

It is further urged by plaintiff in error that the trial court erred in permitting the introduction of the second amended petition and the amendment thereto in evidence. Plaintiff's counsel, having read to the jury a stipulation by the parties as to what certain witnesses would testify to with reference to the condition of the roadway at the point of the accident, to the competency of which defendant's counsel objected, also offered in evidence the pleadings referred to. This was permitted over the objection of defendant's counsel. The pleading of a party in a cause is not admissible in evidence to prove its allegations. The correctness of this proposition would seem to be so manifest as to render the citation of authorities wholly unnecessary. Courts have, however, been called upon to announce it. *Green v. Morse et al.*, 57 Nebr., 391, 77 N. W. Rep., 925; *Bell v. Throop et al.*, 140 Pa., 641. Of course, in a proper case a pleading of one party may be introduced by his adversary to prove admissions made by him or as impeaching statements made by him. The pleadings referred to were, as is usually and properly done, sent to the jury in their consultation room. The court in its charge used the following lan-

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guage: "These pleadings of the parties, that is, the second amended petition and the amendment thereto, the answers of the defendant and the reply of the plaintiff to the second defense therein will be before you in the jury room and you may examine them, but except as to the admissions contained therein, to which I have heretofore called your attention, and except as to the allegations therein referred to in the stipulation of counsel as to what certain witnesses would testify to if present in court testifying, they are not evidence in this case and you must not so consider them." While we regard the introduction of these papers in evidence as clearly erroneous, yet in view of the state of the record as above shown and also of the state of the proof as to all the material issues in the case, we do not find that their admission was prejudicial.

Plaintiff in error also complains that the trial court charged the jury that "at least three-fourths or nine of your number must agree before you can render a verdict." The court evidently entertained the view that Section 11455, General Code, as amended February 6, 1913, effective May 14, 1913, which was passed pursuant to Section 5 of Article I of the Constitution, as amended September 3, 1912, applied at the time of the trial, which was after the statute referred to became effective. The action was begun, however, on January 23, 1912. It was decided in *Elder et al. v. Shoffstall*, 90 Ohio St., 265, that the amendment referred to does not apply to causes pending in the courts of common pleas on the 13th of May,

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1913. The direction of the court was, therefore, erroneous.

The verdict of the jury, after finding the issues in favor of the plaintiff and assessing the amount due, contained the following: "And we do so render our verdict upon the concurrence of twelve members of our said jury, that being three-fourths or more of our number. Each of us said jurors concurring in said verdict signs his name hereto this twenty-first day of May, 1913." It is, therefore, clear that the erroneous instruction of the court with reference to the matter did not work any prejudice to the rights of the defendant. The presumption is that as each juror signed and joined in the verdict he did so because it expressed his judgment, acting under his oath.

We have carefully considered the other assignments of error and we do not find any prejudicial error in the record. The judgment will, therefore, be affirmed.

*Judgment affirmed.*

NICHOLS, C. J., WANAMAKER and MATTHIAS, JJ., concur.

JONES, J., not participating, having sat in the court below.



## Statement of the Case.

THE STATE OF OHIO *v.* BARKMAN ET AL.

*Banks and banking—Corporations organized under free-banking act (49 O. L., 41)—Continue business until act repealed, when—Free-banking act not repealed by Thomas banking act (99 O. L., 269)—Effect of Thomas act—Criminal law—Unlawfully converting bank funds—Section 12474, General Code.*

1. Banking corporations organized under the free-banking act of March 21, 1851, and acts amendatory and supplemental thereto, by the express provisions of that act continue a body politic and with corporate succession until the repeal of that act. The effect of the repeal of section 42 of that act was to authorize these corporations to continue the business for which they were organized during their corporate existence.
2. The act of May 1, 1908, known as the Thomas banking act, does not repeal by implication the free-banking act of March 21, 1851, and acts amendatory and supplemental thereto. On the contrary, section 35 of that act expressly reserves to all such corporations theretofore organized under any law of the state the right to continue business and exercise the powers they possessed at the time of the passage of that act without prejudice and saves to all such associations and corporations all the rights, privileges and powers theretofore conferred upon them, except that after April 1, 1910, they are required to conform their business and transactions to the provisions of that act.

(No. 14555—Decided February 2, 1915.)

EXCEPTIONS by the Prosecuting Attorney to the Decision of the Court of Common Pleas of Greene county.

John H. Barkman, Jacob C. Smith and Charles C. Jackson were indicted by the grand jury of Greene county, Ohio, for intentionally and wilfully converting the funds of The Osborn Bank of Osborn, Ohio, to the use of The J. G. Russell

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Company, for no use or benefit of The Osborn Bank, with intent to injure and defraud The Osborn Bank. The indictment among other things averred that John H. Barkman, Jacob C. Smith and Charles C. Jackson, on the 24th day of June, 1912, and at all times thereafter herein mentioned, were officers and directors of The Osborn Bank, a corporation duly organized and existing under and by virtue of certain laws of the state of Ohio authorizing free banking, passed March 21, 1851, and acts amendatory and supplementary thereto, and then and there operating and existing under and by virtue of the laws of the state of Ohio, with authority to carry on and transact business as a banking company and with power to receive money on deposit, and was then and there engaged in carrying on business as a banking company and receiving money on deposit.

A demurrer was filed to this indictment and sustained by the trial court, to which judgment the prosecuting attorney of Greene county at the time excepted, and upon leave a bill of exceptions was filed in this court.

*Mr. Timothy S. Hogan*, attorney general; *Mr. Frank L. Johnson*, prosecuting attorney; *Mr. John C. Shea* and *Mr. Frank Davis, Jr.*, for the exceptions.

*Mr. Marcus Shoup* and *Messrs. Mattern & Brumbaugh*, against the exceptions.

DONAHUE, J. The indictment alleges that the defendants were directors of The Osborn Bank

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of Osborn, Ohio, and avers that this bank was "existing under and by virtue of certain laws of the state of Ohio, authorizing free banking, passed March 21, 1851, and acts amendatory and supplemental thereto, and then and there operating and existing under and by virtue of the said laws of the state of Ohio, and with authority to carry on and transact business as a banking company and with power to receive money on deposit, and that the said Osborn Bank was then and there engaged in carrying on business as a banking company and receiving money on deposit in the village of Osborn, Greene county, Ohio."

The demurrer to this indictment raises the sole question of the legal existence of this bank and its authority to carry on and transact business as a banking company and receive money on deposit. If the free-banking act, passed March 21, 1851, and acts amendatory and supplemental thereto were not in force in this state, on the date laid in the indictment, then the indictment charges no crime and the demurrer was properly sustained. If these laws were in force, then the exceptions of the prosecuting attorney must be sustained.

It is contended by counsel, appointed by the common pleas court to argue the exceptions in this court, that the free-banking act of 1851 limited the duration of the franchise or charters of the banking companies organized under its provisions to twenty-one years from the date of the act. Section 10 of the original act provided that every company so formed should continue a body politic and with corporate succession until the year 1872

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and thereafter until the repeal of that act. Section 42 of the act provided that nothing therein should be construed to authorize the continuance of banking business under that act after the year 1872. This section, however, was specifically repealed on the 24th day of April, 1879. The only possible purpose of this repeal must have been to permit companies organized under this act to continue business under the original act. At all events that was the effect of the repeal of this section. The right of banks, organized under the free-banking act of 1851, to continue the banking business after 1872 is no longer an open question in Ohio. In the case of *In re Bachtel*, 11 C. C., N. S., 537, it was held that this original free-banking act was still a valid and constitutional act, under the provisions of which the petitioner for writ of *habeas corpus* might be prosecuted. That judgment was affirmed by this court without opinion, and the supreme court of the United States refused to allow a petition in error to be filed.

It is further contended, however, that since the decision in the Bachtel case the free-banking act has been repealed by the Thomas banking act, passed May 1, 1908, by implication, and particularly by section 36 and section 91 of that act. Repeals by implication are not favored. It is only when a statute is in clear conflict with existing legislation upon the same subject-matter that the existing legislation will be held to be repealed by implication by the later act. *Goff et al. v. Gates et al.*, 87 Ohio St., 142; *Thorniley, Auditor, et al. v.*

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*State, ex rel. Dickey*, 81 Ohio St., 108; *Eggleston et al. v. Harrison, Assignee*, 61 Ohio St., 397, 404.

Section 36 of the Thomas banking act provides that all banks, savings banks, savings societies, societies for savings, savings and loan associations, safe deposit companies, or trust companies, savings and trust companies, and combinations of any two or more of such corporations, heretofore incorporated in this state and having paid in the amount of capital stock required by this act to enable them to commence business may, if they so elect, avail themselves of the privileges and powers conferred in that act. The method is provided for certifying such election to the secretary of state and superintendent of banks, and it is further provided that no such election shall be made except upon the vote of at least two-thirds of the capital stock at a meeting of the stockholders, thirty days' notice of which meeting, and of the business to come before it, had been given by a majority of the directors in a newspaper published and of general circulation in the county where such corporation has its principal place of business. This section further provides that after April 1, 1910, every such corporation or association shall in all respects conform their business and transactions to the provisions of this act. This provision does not conflict with the free-banking act of 1851. It does not declare that banking companies organized under that act shall go out of existence, but rather it is provided that they shall in all respects conform their business and transactions to the provisions of this act. In other words, it clearly con-

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templates that certain of the corporations and associations named in section 36 may not elect to avail themselves of the privileges and powers conferred in the Thomas act, and it further contemplates that, notwithstanding their failure to so elect, these corporations shall still have "business and transactions," and it provides that they shall in all respects conform this business and these transactions to the provisions of that act. It is not important whether the phrase "every such corporation or association," in section 36 of the Thomas act, refers only to those availing themselves of the privileges and powers conferred by that act or includes all banking corporations named in the earlier part of that section, regardless of whether they avail themselves of its provisions or not, because section 91 of the same act clearly provides that every banking company, savings bank, savings and loan association, savings and trust company, safe deposit and trust company, society for savings, savings society, and every other such corporation or association except building and loan associations, having the power to receive and receiving money on deposit, then existing and chartered or incorporated, or which may after the passage of that act become incorporated, shall be subject to its provisions, and further provides that no such corporation or association having a less capital stock than the minimum amount provided in section 2 shall be required to increase its capital stock in order to conform to the provisions of that section, but that no such association or corporation shall avail itself of any of the privileges and

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powers conferred by that act until it has complied with the provisions of section 36, and that no corporation or association shall be required to comply with the provisions of sections 1 to 77, inclusive, of the Thomas act before April 1, 1910.

It is insisted because it may not be required to comply with the provisions of sections 1 to 77, inclusive, of the Thomas act before April 1, 1910, that necessarily it must comply with these provisions after that time or go out of business, but if this construction were the correct one, still it does not affect the question before us, because there is no provision in this section that the failure to comply *ipso facto* forfeits the charter of a banking company theretofore established and that thereafter it will have no power or authority to transact a banking business. The most that could be claimed for such construction is that the state of Ohio could, if it elected so to do, compel such banking company to comply with the provisions of sections 1 to 77, inclusive, of the Thomas act, or have its charter declared forfeited by a court of competent jurisdiction. There is no claim that that has been done in this case. Neither section 36 nor section 91 of the Thomas act is in conflict with the provisions of the free-banking act, and neither of these sections, nor both together, effect a repeal by implication of the free-banking act of 1851 and laws amendatory and supplemental thereto.

If there were any doubt whatever upon this proposition all doubt would be removed by the provisions of section 35 of the Thomas act. That section provides in plain and unequivocal language

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that all banking companies theretofore incorporated under any laws of this state may continue their business and the exercise of the powers they now have without any prejudice to any of the powers acquired under the acts under which they were incorporated, and there shall be saved to such corporations or associations all the rights, privileges and powers heretofore conferred upon them. This makes the proposition too plain to require any further discussion. The Thomas act not only does not repeal specifically or by implication the free-banking act of 1851 and laws amendatory and supplemental thereto, but it expressly provides that all banking corporations organized under the provisions of that law, or any other law of the state, shall have the right to continue business and exercise the powers they possessed at the time of the passage of the Thomas act without prejudice, and further specifically provides that there shall be saved to all such associations and corporations all the rights, privileges and powers theretofore conferred upon them.

The judgment of the common pleas court sustaining the demurrer to the indictment was erroneous, and the exceptions of the prosecuting attorney thereto must be sustained.

*Exceptions sustained.*

NICHOLS, C. J., JOHNSON, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.



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## MERRICK v. DITZLER.

*Contracts—Compensation for services by member of family—No implied obligation, when—Express contract necessary, when—Facts and degree of proof to establish recovery—Written or parol contracts.*

1. In an action to recover compensation for services when it appears that the plaintiff was a member of the family of the person for whom the services were rendered, no obligation to pay for the services will be implied, and the plaintiff cannot recover in such case unless it be established that there was an express contract upon the one side to perform the services for compensation and upon the other side to accept the services and pay for them.
2. Such contract may be in writing or it may rest entirely in parol and it may be proved by direct or indirect evidence. If the defense is made by the personal representatives of a deceased person, the contract, whether in writing or parol, must be established by clear and convincing proof.
3. Where the party who is alleged to have made such express contract is a living person, defendant in the suit and competent to testify, it is sufficient in order to entitle the plaintiff to recover that the contract, whether in writing or in parol, be established by the preponderance of the evidence. (*Hinkle et al., Exrs., v. Sage*, 67 Ohio St., 256, distinguished.)

(No. 14194—Decided February 9, 1915.)

ERROR to the Court of Appeals of Allen county.

*Messrs. Welty & Downing*, for plaintiff in error.

*Mr. T. R. Hamilton* and *Mr. W. H. Leete*, for defendant in error.

NICHOLS, C. J. Plaintiff in her second amended petition alleges that in July, 1899, she, being ten years of age, was taken from the children's home

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in Allen county by defendant and placed in defendant's family as a servant, and that in July, 1903, defendant promised and agreed to pay plaintiff the sum of \$500 and furnish her clothing and board provided she would remain in his family until she reached her majority; that she performed her part of the contract and remained with defendant's family until she arrived at the age of eighteen; that during all of said time she performed work and labor in the hay, wheat and corn fields, cared for defendant's children and attended to her household duties. Alleging that no part of said sum had been paid she asked judgment therefor.

Defendant, answering this petition, averred that the plaintiff entered his home as a member of his family and continued and remained a member of and part of defendant's family until after she reached her majority, and was accepted as such, being provided in common with his own children the necessities of life, and that both plaintiff and defendant during all of said period performed such reciprocal duties and obligations devolving on them and each of them incident to the family relation and without expectation of compensation, other than participation in the benefits that accrued to her as a member of the family and household of defendant. Defendant specifically denied that he at any time agreed to pay plaintiff the sum of \$500 for any service she might perform or any other sum whatever. Verdict was had for the full amount claimed in the petition.

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The court of appeals reversed the judgment of the common pleas, whereupon the plaintiff in error prosecuted error to the supreme court of Ohio, seeking a reversal of the judgment of the court of appeals and a reinstatement of the judgment of the court of common pleas.

The evidence clearly shows that the plaintiff in error, although unrelated to the defendant Ditzler, was nevertheless a *de facto* member of his family, enjoying and sharing the comforts of the Ditzler home and assisting in the household duties in all their detail, and she therefore comes within the rule established in Ohio in the first proposition of the syllabus of *Hinkle et al., Exrs., v. Sage*, 67 Ohio St., 256, and cannot recover for services so rendered while a member of the family in the absence of an express contract upon her part to perform the services for compensation and upon the part of Ditzler to accept and pay for such services.

The court of appeals of Allen county reversed the judgment of the court of common pleas for two reasons, closely correlated.

First. Because the court, although requested by the defendant below, refused to give the following special charge to the jury: "If it shall appear that the plaintiff was a member of the family of the defendant from about the first day of July, 1903, until she arrived at the age of eighteen years, performing during such time ordinary services as a member of such family for and in behalf of the defendant and his family, no obligation to pay for such services will be implied and

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she can not recover therefor unless it be established that there was an express contract upon the one side to perform the services for compensation and upon the other side to accept such services and to pay therefor and such contract may be in writing or it may be verbal, and it may be proven by direct or indirect evidence, but to enable the plaintiff to recover the contract must be established by clear and unequivocal proof."

Second. Because the court in its general charge to the jury stated that plaintiff might recover, providing she had proven, by a preponderance of the evidence, the contract in its terms, as set forth in the petition, and that she performed her part of the contract and that the defendant agreed to do the things she alleged in her petition and that he has failed so to do.

The refusal to give the special charge would be logically followed by giving the law as contained in the general charge. The point in dispute has to do with the applicability to the facts in the case at bar of the second proposition of the syllabus of *Hinkle et al., Exrs., v. Sage, supra*, and, if applicable, counsel for plaintiff in error now challenges the soundness of the doctrine of such second proposition, which reads: "Such contract may be in writing or it may rest entirely in parol, and it may be proved by direct or indirect evidence; but to entitle the plaintiff to recover, the contract must be established by clear and unequivocal proof."

First. It is contended that the doctrine of the Hinkle case, wherein it would require an express contract, even if in writing, to be clearly and un-

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equivocally proven, is placing an unwarranted burden on the complainant.

Second. It is further contended that if the contract be express but in parol, it is sufficient for the purpose of the proper administration of justice to employ the phrase "clear and convincing" rather than "clear and unequivocal" as to the degree of proof.

Third. The claim of nonapplicability of the law of the Hinkle case to the case at bar is based on the fact that in the Hinkle case the suit for services was had against the executors of an estate of a deceased person, while in the case at bar the party in whose behalf the services were rendered defends in person.

With respect to the first contention it must be conceded that it is not without merit. The term "unequivocal" is defined to mean, among other things, "without doubt," "clearly demonstrated," "free from uncertainty." It implies proof of the highest possible character, equaling, if not exceeding, the proof required of the state in a criminal proceeding. It imports proof of the nature of mathematical certainty—something that in human affairs is all but impossible to obtain.

In the ordinary civil case the degree of proof, or the quality of persuasion as some text-writers characterize it, is a mere preponderance of the evidence. Indeed, the supreme court of Ohio, in *The C., H. & D. Ry. Co. v. Frye*, 80 Ohio St., 289, reversed a judgment of the lower court in that the trial judge charged the jury "that unless the party

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upon whom the burden rested has *satisfied* your minds by a preponderance of the evidence recovery could not be had," the supreme court holding that such instruction imposed a degree of proof greater than a mere preponderance.

In criminal cases in all civilized countries the degree of proof is enhanced beyond that of civil cases in the degree that the state has a more jealous concern for the lives and liberties of its inhabitants than it can possibly entertain for property rights. The burden of all such prosecutions is to prove every essential element of the crime beyond a reasonable doubt. There is, however, a well-recognized intermediate degree of proof required in a certain class of cases—a stricter standard, generally termed "clear and convincing"—cases where the charge of fraud is involved; proving the existence of a lost or spoliated will; an agreement to bequeath by will; mutual mistake sufficient to justify reformation of an instrument; engrafting of trusts; establishment of an equitable mortgage out of deed absolute on its face, and kindred questions.

This tendency of courts to employ in the exceptional civil case more emphatic terms than "clear and convincing" is criticised by many standard writers on the subject of evidence. Wigmore, for instance, says, volume 4, section 2498: "The chief topic of controversy has been whether in certain civil cases the measure of persuasion for criminal cases should be applied. Policy suggests that the latter test should be confined to its original field,

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and that there ought to be no attempt to employ it in *any* civil case."

It would seem that in cases of the nature suggesting a higher degree of proof than that characterized as a mere preponderance, the ends of justice would be best met by the use of the phrase "clear and convincing." Any greater burden in civil cases of the peculiar nature justifying such requirement of a higher degree of proof than a preponderance would work a hardship and injustice.

We are constrained to think that if the attention of the court, when it was announcing the rule in *Hinkle et al., Exrs., v. Sage, supra*, had been directed to the obvious distinction between a claim against a deceased person and one against a living person, able to testify and assist in the preparation of his defense, the proposition as to the degree of proof declared in the second proposition of the syllabus would have been modified. We feel it our duty now to make the modification indicated.

The second contention, that if a contract for services rendered by one member of a family to another of the same family be in writing, then the reason requiring any higher degree of proof than a mere preponderance no longer obtains, is also of force.

If a father wishes to reward a faithful daughter for the sacrifice of the best years of her life in filial devotion and, not content with loose expressions of gratitude and promise to pay, reduces his desires to writing and thereby solemnly agrees to pay for the daughter's services, why such an ex-

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press contract should be supported by proof of a higher character than that employed in the ordinary civil action is difficult to understand.

It is no answer to the proposition that services of this character should not be prompted by avarice or any expectation of reward and that motives of affection and duty should prompt their performance. The law fosters and protects the domestic relation; puts it on a high plane of dignity when it says that services rendered between members of the same family shall be presumed to be gratuitously rendered even though such services may be performed at the express request of the person receiving the benefit. Such services are too sacred to be commercialized into a contract to pay by implication. But there is no sound reason calling for a rule that one member of a family may not contract in writing to pay another member of that family for services of such a nature, and a contract so made and performed ought not to be burdened with any peculiar degree of proof for its enforcement. It is just as proper that a man should be allowed to make his own contract as it is that he should make his own will. There being, however, the legal presumption that such services were rendered gratuitously, theoretically the evidence to overcome the presumption, even if the contract be in writing, must be clear and convincing; but practically, since the evidence of the intention of the parties has been reduced to writing, the writing itself furnishes the proof of the degree characterized as clear and convincing and satisfies the requirements of the law in this respect.



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It is urged by counsel for defendant in error that since the second proposition of the Hinkle case, *supra*, makes no distinction as to the defense being made by a living person party to the contract as against a defense by one's personal representative, the trial court was bound by the law of that case and should have given the special instruction, since it conforms in all respects to the law of that case. It can be said that, where the facts are substantially similar, the inferior court must yield its convictions if antagonistic to the law as defined by the court of last resort, but if the controlling facts are not the same there is no such duty laid on the trial judge. It must be admitted that the second proposition of the syllabus in the Hinkle case makes no distinction as to degree of proof between the defense of the living and the dead, and a consideration of the office of a syllabus and its binding force would be suggested. A syllabus is the law of the case establishing principle and doctrine, binding alike on citizens and courts, both inferior and of equal rank. The primary inquiry should be: Are the facts substantially similar? And if not, Is the reason that would impel the establishment of the rule of proof the same in the one instance as the other?

In the case of *Admrs. of Gavit v. Chambers and Coats*, 3 Ohio, 495, the court say: "No maxim of jurisprudence is of more universal application than that where the reason is the same the law should be the same," and in the case of *Orr v. Bank of the United States et al.*, 1 Ohio, 36, the old Latin

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maxim, Anglicized, is employed: "When the reason of the law ceases the law itself ceases."

In the case of *Williams v. Roberts et al.*, 5 Ohio, 35, Hitchcock, J., says: "The principal reliance of the counsel for the complainant is upon case of *Tiernan v. Beam, etc.* As before remarked, we believe that case to have been correctly decided, and we should feel ourselves bound by its authority. But we are unwilling to extend it beyond a case similarly situated."

In the opinion of Davis, J., in the Hinkle case, *supra*, eight authorities of other jurisdictions are cited as supporting the doctrine there established, and an examination of those cases develops the fact that without exception the action was defended by the personal representatives of a deceased person. No case is there relied on, nor is there any cited to the court in the case now under consideration, establishing the doctrine of the Hinkle case as to degree of proof where defense in an action for recovery for personal services by one member of a family against another member is made by a living person. Moreover, the reasons advanced for the establishment of this doctrine do not obtain where both parties to the action are living persons. Those reasons are that "Cases of this kind are odious and are not favored by the courts because they afford opportunity for fraud against the estates of deceased persons and great temptation to perjury, by disappointed or avaricious relatives." Hinkle case, *supra*, page 262.

In *Candor's Appeal*, 5 Watts & Serg. Rep., 513, 515, Rogers, J., says: "In *Walker's Estate*, we took

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occasion to express the reluctance with which we listen to claims for wages by a son against the estate of a deceased parent, and subsequent experience has not changed or modified the opinion then entertained. It is pregnant with danger, as we verily believe, as well to the *rights of creditors* as to the *other heirs*."

In *Zimmerman v. Zimmerman*, 129 Pa., 229, it is held: "To support a claim for nursing or other services such as filial duty and common humanity require a son to render, there must be better proof than loose declarations of gratitude and of an intention to compensate, made by a father in his last sickness." Similar observations will be found in all the cases touching on the point in question.

The court is of the opinion, therefore, that the trial judge, in view of the facts developed in the case at bar, was justified in declining to follow the rule of the Hinkle case, *supra*, and was correct in his view of the law when he declined to give the special instruction and in limiting the degree of proof to the requirement of the ordinary civil action.

The first proposition of the Hinkle case, *supra*, is approved as the law of Ohio in all its vigor.

The second proposition of the syllabus should be limited in its application to cases where the defendant is the representative of a deceased person, and it is suggested that employment by the judge in charging jury of the term "clear and convincing" would be happier than "clear and unequivocal."

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Attention is called to the fact that the court in its very latest utterance on the subject employed the standard term "clear and convincing" in a case of a nature that would demand the highest degree of proof available in a civil case. See *Spengler v. Sonnenberg et al.*, 88 Ohio St., 192, the third proposition of the syllabus reading: "Where the express authority of an agent to sign an agreement in writing for the sale of lands rests in parol, the proof must be *clear* and *convincing* not only of such parol authority, but also that the authority was such as to permit the inclusion of all of the material terms which are embodied in the instrument."

We think that a due regard for the recognized value of uniformity in legal rules requires us to point out the incorrectness in the use of the word "unequivocal."

The term "clear and convincing" has come to have a well-defined meaning with the bench and bar. It indicates a degree of proof required in civil cases such as we referred to less than the degree required in criminal cases, but more than required in the ordinary civil action.

The needless multiplication of words in explanation to a jury of the degree of proof required in a cause in hearing instead of assisting often operates to mislead and confuse. Experience of two centuries clearly indicates that in the ordinary civil cases the degree of proof be characterized as "a preponderance," in the exceptional civil case of the type hereinbefore indicated it should be "clear and convincing," and in the criminal case "beyond a reasonable doubt."

## Syllabus.

The judgment of the court of appeals must in consequence be reversed and that of the common pleas affirmed.

*Judgment reversed.*

JOHNSON, DONAHUE, WANAMAKER, NEWMAN,  
JONES and MATTHIAS, JJ., concur.

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GLEASON v. BELL.

*False representations—Sale of real property—Purchaser entitled to recover, when—Pleading—Wife bound by husband's representations and acts, when.*

1. Where a purchaser was induced to buy and pay for a city residence, by false representations made to him by the vendor as positive statements of fact clearly implying knowledge of the owner of the truth of the facts stated, and made under such circumstances that the vendor should have known of the falsity of the representations, and they were of such a nature as to affect the character, utility and value of said property, and the purchaser had a right to and did rely thereon, and suffered damage by reason thereof, he may recover. In such a case an averment that the vendor knew the representations to be false and made them with intent to deceive is not essential.
2. If a woman permit her husband to manage and make contracts for sale of her property as his own and, in pursuance of her authority, he makes a sale of her property to one whom he induces to purchase by statements and representations relative to the character, utility and value of the property, upon which the purchaser would have a right to rely as coming from the owner, and she accepts the benefits of the contract and makes conveyances to the purchaser so procured, she is bound by the representations made.

(No. 14162—Decided February 23, 1915.)

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ERROR to the Court of Appeals of Cuyahoga county.

On October 21, 1911, the defendant in error, Myrtle M. Bell, filed her petition in the court of common pleas of Cuyahoga county, as follows:

"Myrtle M. Bell, the plaintiff, for her cause of action against the defendant, says that on and prior to the 18th day of August, 1907, the defendant, Mary A. Gleason, was the owner of a house and lot at No. 38 Taylor road in the village of East Cleveland, Cuyahoga county, Ohio, which said lot was located on the southwesterly side of Taylor road, beginning at a point 352 feet distant in a southeasterly direction from the southeasterly line of Euclid avenue. Said lot was 40 feet front on Taylor road, 120 feet deep, and 32.61 feet wide in the rear.

"Second: She says that on and immediately before said 18th day of August, 1907, the defendant's husband, Michael J. Gleason, represented to her that he was the owner of said house and lot; that the same was unencumbered except by mortgage for \$3000.00, held by The Citizens Savings and Trust Company of Cleveland, Ohio; and he offered to sell the same to her and to pay the interest on said loan to October 15th, 1907, and to pay the taxes for the year 1907, and to make numerous additions and alterations thereto before the first day of October, 1907, if the plaintiff would assume the payment of said mortgage and would pay to him the sum of \$2000.00 in monthly installments of at least \$50.00 per month, and the further sum in cash of

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\$1600.00. As an inducement to plaintiff to accept his offer aforesaid, he represented to her that the property in that neighborhood, fronting upon Taylor road, on both sides, between it and Euclid avenue and beyond it on Taylor road, and the property in the rear of it, fronting on Charles road, between it and Euclid avenue, was an exclusively residence district, and that he himself owned the greater part thereof; and that all of said property was subject to conditions and restrictions binding upon the owners thereof, to the effect that it could be used for residence purposes only; that no building could be erected thereon less than two and one-half stories in height, with the roofs of No. 1 black or green slate, or nearer than two feet to the southerly line of the lots, or more than two and one-half feet therefrom; that the front line of porches could not be nearer than twenty feet from the westerly line of Taylor road; that no foundation of any house could be less than 34 x 30 feet, nor more than 38 x 24 feet; that no fence or enclosure of any kind could be erected or placed within sixty feet from the street line; and that no double or two-family house, terrace, or apartment, could be erected or placed thereon. He represented to her that the lots fronting on Taylor road, immediately to the northwest of the premises in question, were then owned by one Barnes; that they were subject to the same restrictions and conditions hereinbefore recited; and that all the property between the Barnes lots and Euclid avenue was subject to existing and valid restrictions and conditions as aforesaid. The lot in question was then improved by a residence com-

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plying with the terms of said restrictions and conditions, and was located immediately beyond a bend in Taylor road, which with said restrictions and conditions would insure to the occupants of said lot and the house thereon an uninterrupted view towards Euclid avenue and the adjoining territory. She says that at the time, the neighborhood of said lot was one highly desirable for residence purposes by reason of its proximity to Euclid avenue, a main highway of local and national reputation for its beauty and importance.

"Third: She says that she relied entirely upon the truthfulness of the representations so made to her by said Michael J. Gleason, and entered into an agreement with him on the 18th day of August, 1907, by her husband, Herbert W. Bell, who acted for her as her agent and attorney, to purchase said property upon the terms and conditions hereinbefore recited and then paid to him the sum of \$25 to apply upon the cash payment. She says that on or about the 20th day of September, 1907, the said Michael J. Gleason furnished her with a statement regarding the title to and incumbrances upon the premises aforesaid, made by The Guarantee Title & Trust Company of Cleveland, Ohio, on the 20th day of September, 1907, which said statement contained a recital that the premises in question and other premises deeded to the said Mary A. Gleason on July 6th, 1907, by deed from one George Davies, did contain the restrictions and conditions aforesaid, to be binding upon the heirs and assigns of the grantees and to run with the land. She says that the premises in question had originally been repre-



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sented to her by the said Michael J. Gleason to be forty feet in width throughout, and that on disclosure by said statement that they were of less width, it was agreed that the plaintiff could have a credit of \$175.00 on the cash payment to be made by her in full satisfaction of the failure of said lot to accord with the representations of the defendant in that respect.

"Fourth: She says that after the making of said agreement of August 18th, 1907, by the statement of title aforesaid and otherwise, she became aware that the legal title to said premises was vested in the defendant, Mary A. Gleason, and that Michael J. Gleason in making said agreement of August 18th, 1907, was acting for his said wife, Mary A. Gleason, as his undisclosed principal, and she says that relying solely upon the representations aforesaid and without further search, knowledge, or disclosure, she accepted, on September 23rd, 1907, the warranty deed of the defendant to her of the premises aforesaid, containing said restrictions and conditions and paid to her the consideration then agreed upon to be paid by this plaintiff and executed and delivered to the defendant her note and mortgage deed to secure the same for the unpaid portion of said purchase price, and assumed the payment of said mortgage to The Citizens Savings & Trust Company; that she did, on or before January 16th, 1908, comply with all the requirements and conditions of her agreement with the defendant and did fully satisfy her indebtedness to her.

"Fifth: She says that thereafter there was constructed upon the lots adjoining the premises

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so conveyed to her, upon the north, and represented to her to be owned by one Barnes, two two-story apartment houses, within less than fourteen and nine feet, respectively, from the street line of Taylor road; that one of said apartment houses was built within six inches of the southerly line of the lot adjoining this plaintiff's property; that between said lots so owned by Barnes, and Euclid avenue there has since been constructed a four-story flat apartment house within six feet from the street line of Taylor road; that there has since been constructed upon the property at the corner of Euclid avenue and Charles road, represented to her to be owned by said Gleason, and upon the property fronting on Charles road, in the rear of said corner property, three flat apartment houses, all of said four last-named flat apartment houses are constructed on property which the said Michael J. Gleason represented to her, as aforesaid, to be subject to the conditions and restrictions hereinbefore named.

"Sixth: As soon as she became aware that the construction of such flat apartment houses was threatened on the premises aforesaid, she says that she caused an investigation to be made and then for the first time learned that the representation made to her by the said defendant, as aforesaid, concerning the conditions and restrictions upon said property, were false and fraudulent, as they were in fact, and that no such restrictions or conditions, binding upon the heirs and assigns of the

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then owners of the land, or running with the land, in fact, existed or had ever been created.

"Seventh: She says that immediately upon the purchase of said premises she and her husband moved into the house thereon, and ever since, with their family, have occupied the same as their home; that by reason of the erection of said flat apartment houses the dwelling house so occupied by her, and the lot aforesaid, have been materially deprived of light, air and view; their utility to her has been seriously lessened and impaired and their value greatly diminished; to her damage in the sum of two thousand dollars (\$2000).

"Therefore she prays judgment against the defendant in the sum of two thousand dollars."

A demurrer to the petition was sustained by the court of common pleas on the ground that the petition did not state facts sufficient to constitute a cause of action. Defendant in error not desiring to further plead, judgment was entered in favor of plaintiff in error.

The court of appeals reversed the judgment of the court of common pleas and remanded the cause for further proceedings. Thereupon a petition in error was filed in this court seeking to reverse the judgment of the court of appeals.

*Mr. Walter C. Ong* and *Mr. Howard A. Couse*, for plaintiff in error.

*Mr. Norton T. Horr*, for defendant in error.

MATTHIAS, J. The questions presented arise from the contention that the petition fails to state

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a cause of action in that no fraudulent intent or *scienter* is alleged, the representations complained of were not material, were not within the authority of the agent making them and that the plaintiff had no right to rely thereon.

The claim made by the plaintiff in her petition is in substance that the husband of the defendant, having the management of her property and acting in regard thereto with her authority, representing himself as the owner thereof, induced the plaintiff to purchase said property, a residence in the village of East Cleveland, by means of certain false representations as to the building restrictions in the immediate vicinity of said property, which materially affected the character, utility and value of said premises; that such representations were made as positive statements of fact and were relied upon entirely by the plaintiff. Under the circumstances detailed in this petition it is not incumbent upon the plaintiff to aver and prove that the defendant knew the representations were false and made them with intent to deceive. The facts set up in this petition show that the party making the representations should have known whether they were true or false, and further show that they were made not as an expression of opinion but as positive statements of fact, with the intention that they should operate as an inducement to the sale of said premises. The recital of the transaction in the petition sufficiently shows that the representations were so made as to imply that the maker knew them to be true and intended that his

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statements should be so understood, believed and relied upon and operate as an inducement to the purchase of the premises.

"A positive statement implies knowledge, and if the party who makes it has no knowledge on the subject, he has told *scienter* what is untrue; he has affirmed his knowledge." 1 Bigelow on Fraud, 513.

In support of the contention that the petition is insufficient, counsel for the defendant cite the case of *Taylor v. Leith*, 26 Ohio St., 428, where, in passing upon instructions to the jury, the court held that if the representations were believed to be true, and the facts of the case were such as to justify the belief, there would be no fraud. The view that the petition in the case at bar states a cause of action is not out of harmony with the conclusion of the court in that case. They are entirely consistent. When it is shown, as it is in the petition before us, that positive statements of fact are made relative to the premises, which are material to the transaction, and under circumstances such that he who makes the representations should know the facts, and it is shown too that such statements were untrue, the view most favorable to the defendant is that he must at least assume the burden of showing that he believed his representations true and that the facts were such as to justify his belief.

When tested by the rule stated by this court in the case of *Aetna Ins. Co. v. Reed*, 33 Ohio St., 283, this petition is found to be sufficient. It meets

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every requirement there stated—false representations of a material fact, upon which plaintiff relied, and upon which, from the circumstances of the case, he had a right to rely, and, in doing so, was misled to his injury, whether the party making the representations knew them to be false or not, if he had no reason to believe them to be true, and they were made with the intention of inducing the person to whom made to act upon them and he did so, sustaining a damage in consequence. All these facts are shown in the petition, and surely nothing further should be required of the plaintiff.

In the case last cited and in *Mulvey v. King*, 39 Ohio St., 491, the court has somewhat modified the burden theretofore cast upon one who seeks to retrieve his losses sustained by reason of the misrepresentations of one with whom he deals. In the latter case it was held that against one who claims the benefit of, and seeks to enforce, a contract procured by means of misrepresentations, recoupment may be had if it only appear that the representation was "material and substantial, affecting the identity, value and character of the subject-matter of the contract, that it was false, and that the other party had a right to rely upon it, and that he was induced by it to make the contract."

To the same effect is the holding of the court in *Baughman v. Gould*, 45 Mich., 481, and *Pierce v. Tiersch*, 40 Ohio St., 168.

The representations complained of in the petition before us, while not affecting the identity, do

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affect the character, use and enjoyment, and, hence, the value of the premises, the subject-matter of the contract. Nor can defendant complain because the plaintiff accepted the positive statements of fact made by the defendant, and presumably within his knowledge, at their face value, and relied thereon. 20 Cyc., 33-35, and cases cited. The representations pleaded must be regarded as material; for they substantially affected the value of the property and were calculated to and did induce the sale. 1 Bigelow on Fraud, 497. These representations were made by the husband of the defendant, who permitted him to manage and make contracts relative to her property, as his own, and she ratified his acts and accepted the benefits of the contracts thus procured. Under the facts pleaded she is bound by the representations made.

*Judgment affirmed; cause remanded to common pleas court.*

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and JONES, JJ., concur.

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PAULIN *v.* SPARROW.PAULIN *v.* SPARROW.

*Jurisdiction—Lawful exercise presumed, when—Service of summons—Defective return—Jurisdiction of parties not defeated, when—Return may be amended, when—Judgment as to amendment final, when—Evidence and collateral suit.*

1. Where it does not otherwise affirmatively appear from the record, it will be presumed that a court of general jurisdiction regularly acquired and lawfully exercised its jurisdiction over the parties.
2. Where a defendant has been duly and legally served with summons, a defective return by the officer making the service does not defeat the jurisdiction of the court over the person of a defendant legally served with process.
3. A court has the authority to order the return of process amended in accordance with the facts relating to such service either before judgment or at any time after judgment that the evidence is available to establish the facts upon which the judgment of the court ordering the return amended is predicated.
4. Where a defendant seeks to amend the return of the officer serving the process by striking out certain matters and things stated therein in relation to the service thereof, and the court upon the evidence offered finds against the defendant and refuses to order the amendment, such judgment is final and conclusive upon the defendant until reversed, vacated or set aside by a court of competent jurisdiction, and the defendant cannot introduce evidence upon that issue or relitigate that question in a collateral suit.

(Nos. 14277 and 14278—Decided February 23, 1915.)

ERROR to the Court of Appeals of Mahoning county.

On the 13th day of May, 1885, Charles Davidson filed a petition in the common pleas court of Mahoning county against Mary J. Davidson and



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Emma S. Davidson, a minor, being cause No. 13818 on the civil docket of that court, averring among other things that he and William Davidson, late of Boardman township, Mahoning county, were brothers; that William Davidson died on the 26th day of December, 1884; that Mary J. Davidson is the widow of William Davidson and Emma S. Davidson, *a minor, is the only child of said William Davidson, and that she has no duly appointed guardian*; that on the 27th day of April, 1864, the plaintiff and William Davidson were seized in fee simple of certain tracts of land described in the petition and situated in Mahoning county, Ohio, each having an undivided one-half interest therein; that William Davidson entered into an agreement with the plaintiff to sell to the plaintiff the undivided one-half of the lands described in the petition for the sum of \$1,360, which plaintiff paid in full; that William Davidson delivered the possession of said premises to plaintiff on the day and date of making this contract, and that the plaintiff has ever since remained in the quiet and peaceable possession of the premises as the owner thereof; that long after said William Davidson had sold these lands to plaintiff he married the defendant, Mary J. Davidson; that plaintiff has been in the actual possession of the real estate described and has occupied the same as owner thereof for more than twenty-one years last passed; that the defendants claim an estate or interest in said real estate adverse to plaintiff's right, and prayed that his title might be quieted in and

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to real estate described in the petition as against the claims of said defendants or either of them.

Mary J. Davidson, widow of William Davidson, waived the issuing and service of summons and entered her voluntary appearance, but filed no answer or other pleading. On the 7th day of September, 1885, summons issued, upon the precept of plaintiff, for Emma S. Davidson, a minor, the sheriff making the following return thereof:

“The State of Ohio, Mahoning County, ss.

“Received this writ Sept. 7th, A. D. 1885, and pursuant to its command on the 7th day of Sept., A. D. 1885, I personally served the within named defendant, Emma S. Davidson by delivering to her a true and certified copy thereof with endorsements thereon. I also left a like copy with Mary J. Davidson with whom the minor child resides \* \* \*.

“ELI B. WALKER, *Sheriff*,

“By W. P. PRINDLE, *Deputy Sheriff*.”

On the 16th day of February, 1912, Margaret Sparrow, who had succeeded to the interest of Charles Davidson in the land described in his petition, filed a motion in this cause to amend the sheriff's return by adding thereto the following: “The said Mary J. Davidson being the mother of said defendant, Emma S. Davidson and the person having the care and control of said infant; diligent search having first been made by me, and no guardian or father of the said Emma S. Davidson being found, the father of the said Emma S.

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Davidson being deceased and there being no guardian."

Notice of this motion was served upon Emma S. Davidson, now Emma D. Paulin, the plaintiff in error in this action. Upon the hearing of the motion it was admitted by Emma D. Paulin, *nee* Emma S. Davidson, that at the time of the commencement of this action her father was dead, that she had no guardian and that she resided with her mother, Mary J. Davidson, but she denied the right of the court to amend the process of the sheriff as asked for in the motion and objected to the introduction of any evidence or admissions in support of the motion. Her objections were overruled and exceptions noted. Emma D. Paulin offered in her own behalf the affidavit of Mary J. Davidson. Objections were made to the introduction of this affidavit, but no ruling was made thereon by the trial judge. Mary J. Davidson, however, was then called as a witness and testified orally that she is the mother of Emma S. Davidson, now Emma D. Paulin; that as such mother she had the care, custody and control of Emma S. Davidson at the time service of summons in this action was purported to have been made upon her; that Emma S. Davidson was then a minor under the age of fourteen years; that her father was dead; that no legal guardian had ever been appointed for her; that she then resided with her mother, the witness, in Mahoning county, Ohio, and that no service of any summons was ever made upon Emma S. Davidson or upon her as mother of said minor defendant. To the introduc-

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tion of this evidence Margaret Sparrow objected. The objections were overruled and exceptions noted. No other or further evidence was offered and the court refused to amend the return in conformity to the testimony of Mary J. Davidson, but found the motion of Margaret Sparrow well taken and sustained the same and ordered the return of the sheriff amended in manner and form as stated in the motion, to which judgment Emma D. Paulin, *nee* Emma S. Davidson, excepted and filed a motion for a new trial, which motion was overruled. The court of appeals affirmed this judgment, and this proceeding in error (cause No. 14277) is now prosecuted to reverse the judgment of the court of appeals affirming the judgment of the common pleas court sustaining the motion to amend the sheriff's return on the summons issued in said action, and refusing to further amend the return in conformity with the evidence of Mary J. Davidson.

On the 25th day of March, 1911, Emma D. Paulin, *nee* Emma S. Davidson, filed her petition in the common pleas court of Mahoning county against Margaret Sparrow, averring that she has a legal estate in and is entitled to the possession of the undivided one-half of certain real estate described in her petition (which is the same real estate described in the petition of Charles Davidson against Mary J. Davidson and Emma S. Davidson, filed in that court May 13, 1885). She avers that the defendant, Margaret Sparrow, unlawfully keeps her out of possession of said real estate and denies her right in and to said premises,

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and prays judgment for the possession of said premises against the defendant and for costs.

To this petition Margaret Sparrow filed an answer, averring in her first defense that she is the sole owner of the premises described in plaintiff's petition and denies that plaintiff has any interest therein and denies each and every allegation, statement and averment in the petition not expressly admitted to be true. For a second defense, she avers that the plaintiff's cause of action, if any she has, arose more than twenty-one years before the commencement of the action and is barred by the statute of limitations. For a third defense she avers that she and those under whom she claims have been in open, notorious and adverse possession of this property for more than twenty-one years prior to the commencement of the action, and for a fourth defense she avers that on the 13th day of May, 1885, Charles Davidson, who was her predecessor in title and who was then the owner of all of the premises described in plaintiff's petition, filed in the common pleas court of Mahoning county his petition against this plaintiff and her mother, Mary J. Davidson, to quiet his title to said premises, the same being cause No. 13818 in said court and being fully recorded in volume 69, page 475, of the records of said court. She further avers that such proceedings were had that a judgment was entered by the court quieting the title of Charles Davidson in and to this property as against the claims of Emma S. Davidson, now Emma D. Paulin, and the said Mary J. Davidson, and en-

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joining them and each of them from setting up any claim to said premises or any part thereof adverse to the title or possession of the said Charles Davidson.

To this answer the plaintiff filed a reply, averring among other things that in the action in which the judgment pleaded in the defendant's fourth defense was entered the court attempting to render that judgment had no jurisdiction of the person of plaintiff; that she was never served with process in that action; that no answer in her behalf was filed in said cause by any one legally authorized so to do; that at the time said cause was pending and said pretended judgment and decree rendered therein by said court she was a minor under the age of fourteen years.

The parties having waived a jury, this cause was submitted to the court upon the pleadings and the evidence. The defendant offered in evidence a transcript of the proceedings in the case of Charles Davidson against Mary J. Davidson and Emma S. Davidson, being cause No. 13818 on the civil docket of the common pleas court of Mahoning county, together with all the files and pleadings and all the proceedings had in that action, including the motion and proceedings thereon to amend the sheriff's return, to all of which the plaintiff objected. The objections were overruled and her exceptions noted. The court on the issue joined found for the defendant and dismissed the plaintiff's petition with costs. The court of appeals of Mahoning county affirmed this judgment of the common pleas court, and this proceeding in

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error (No. 14278) is prosecuted in this court to reverse the judgment of the common pleas court and the judgment of the court of appeals affirming the same.

*Mr. Charles Koonce, Jr., and Mr. William Z. Davis,* for plaintiffs in error.

*Messrs. Hine, Kennedy & Manchester,* for defendants in error.

DONAHUE, J. The plaintiff in error contends that the original return of the officer serving the summons upon her in cause No. 13818 on the civil docket of the common pleas court of Mahoning county is fatally defective, that the decree of court purporting to determine her rights in the property described in her petition is void as to her, and that that court had no jurisdiction to order an amendment of the return of the officer to conform to the admitted facts. Counsel for defendant in error concedes that unless plaintiff in error was duly and legally served with summons in that action the judgment in that case would be void as to plaintiff in error and no bar to a recovery in the second action.

There is a substantial difference between defective service and defective return of service. If the service is defective the court acquires no jurisdiction over the person of the defendant and no jurisdiction to make or enter any order, judgment or decree binding upon a defendant defectively served with process, but if the service was in fact

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duly and legally made, as directed by the statutes of this state, the court has jurisdiction under the provisions of Section 11363, General Code, to order the return of the officer amended to speak the truth. Where it affirmatively appears from the record of a court of general jurisdiction that the defendant has not been legally served with process, a decree purporting to determine the rights of such defendant is void. If, however, the record is silent on the subject of service or upon any question material to the service it will be presumed that notwithstanding the silence of the record the court had obtained jurisdiction over the person of the defendant. *Lessee of Moore et al. v. Starks*, 1 Ohio St., 369. The rule is well stated by Williams, J., in the case of *Kingsborough v. Tousley et al.*, 56 Ohio St., 450, in this language: "The rule generally prevails, and is nowhere more firmly established than in this state, that when it does not otherwise affirmatively appear from the record, it will be conclusively presumed, whenever a domestic judgment of a court of general jurisdiction is drawn in question in any collateral way, that the court regularly acquired and lawfully exercised its jurisdiction over the parties."

The original return of the sheriff in this case does not affirmatively show that the minor defendant was not legally served with process, but it does fail to state sufficient facts to show that the service was made in manner and form as the statute directs. The statute in force at the time of the purported service of this summons provided that "When a defendant is under the age



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of fourteen years, the service must be upon him, and also upon his guardian, or his father; or, if neither his guardian nor his father can be found, then upon his mother, or the person having the care of such infant, or with whom he lives \* \* \* \*." (Section 5047, Revised Statutes of 1880.)

The petition in this action averred that Emma S. Davidson was a minor, that her father, William Davidson, was dead and that she had no duly appointed guardian. These facts should have been noted in or upon the summons as a guide to the sheriff in making the service. It does not appear, however, that anything was noted in or on the summons except that she was a minor. The return upon the summons is as follows: "\* \* \* I personally served the within named defendant, Emma S. Davidson by delivering to her a true and certified copy thereof with endorsements thereon. I also left a like copy with Mary J. Davidson with whom the minor child resides. \* \* \*." This service of the summons in this case upon the minor defendant Emma S. Davidson, was in direct conformity with the statute providing for service of summons upon minors under fourteen years of age, but the return of the officer serving the process, taken alone, does not affirmatively show that fact. This return was defective in that it failed to state the facts, now admitted to be true, to-wit, that the father was dead and that no legal guardian had been appointed for the defendant, but in so far as the return states any facts that it was the legal duty of the sheriff to

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state in relation to the manner of service of summons it does not affirmatively show that the service was not properly made.

Upon the hearing of the motion to amend the return of the sheriff it was admitted by plaintiff in error that her father was then dead, that she had no legal guardian at the time and that she then resided with her mother, Mary J. Davidson, in Mahoning county, Ohio. These admissions, taken in connection with the return of the sheriff, show a valid and legal service of summons in that action, vesting jurisdiction in the court, not only to make and enter the decree against this defendant quieting the plaintiff's title in the lands described in his petition but also to order the return to be amended by stating these facts therein, not for the purpose of conferring, by *ex post facto* amendment of the return, jurisdiction upon the court to render a valid judgment, for that judgment was either valid or invalid at the time it was rendered and the subsequent amendment could not change that fact, but rather for the purpose of affirmatively showing upon the record that the court had acquired jurisdiction by process over the person of the defendant and perpetuating the evidence of that fact.

The important question is not whether the return of service is defective, but rather, was the defendant in fact duly and legally served with process? So far as this defect in the return of the sheriff is concerned, the defendant is not now contending that she was not duly and legally served with summons. Her contention is that the

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original return does not fully show that fact. It is true that she disputes the facts stated in the return, but conceding for the present that the facts stated in the return are true and binding upon her, then the only question is, Will a defective return which does not affirmatively show upon its face that no service was in fact made upon defendant defeat the jurisdiction of a court over a defendant who was in fact legally served with process? If this defendant had come into court before judgment and moved to quash the service, and these further facts that are not stated in the return of the officer were admitted or proved, the court would have promptly overruled the motion to quash and ordered the return of the sheriff amended to speak the truth. If at any time after the rendition of this judgment, this plaintiff had made a direct attack upon it and it had been admitted or made to appear by the evidence that she had been duly and legally served with summons, but that the return of the sheriff was defective in that it did not show the facts authorizing the service of a copy of the summons to be made upon Mary J. Davidson, her petition would have been promptly dismissed.

It would be a strange construction of the law that would permit a defendant to admit that he had been duly and legally served with summons and yet deny the jurisdiction of the court to render a valid judgment against him merely because the return of the officer serving the process is defective.

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Upon the hearing of the motion of Margaret Sparrow to order the return of the sheriff amended, the plaintiff in error denied the truth of the matters and things stated in the return of the officer in relation to the manner of service upon her. In support of this contention she offered as a witness Mary J. Davidson, who testified that at the time of the purported service the father of Emma S. Davidson was dead, that she had no legal guardian, that she was then a minor under fourteen years of age and resided with the witness, who is her mother, in Mahoning county, Ohio, that no copy of summons was left with the witness and no copy of the summons was served upon this plaintiff in error. This was a question of fact for the court, to be determined as any other question of fact in the case. True, the plaintiff in error did not file a formal written motion to amend the sheriff's return in conformity with this evidence, but that was the only purpose for which this evidence could be received. It was not pertinent to the questions raised by the motion of Margaret Sparrow. The court found that this evidence was not sufficient to contradict the return made by a sworn officer of the law; that the transaction to which this evidence related occurred so many years prior to the time the witness testified that the facts might have escaped her memory, notwithstanding she was testifying to the truth as she now remembered it. That issue having been presented to the court in that case, its judgment thereon was final and conclusive upon the parties thereto until vacated or reversed by a court of competent jurisdiction, and

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she is not now entitled to relitigate the question or offer evidence touching the same issue in a collateral action.

The plaintiff in error prosecuted error to this judgment of the common pleas court, both as to its order sustaining the motion of Margaret Sparrow and ordering the return amended as therein requested and its refusal to further amend the return in conformity with the evidence of Mary J. Davidson. The second assignment of error in the petition in error complains of the exclusion of evidence. The affidavit of Mary J. Davidson was offered, objections made, but no ruling made by the court. Then Mary J. Davidson was called and testified orally as to all the matters and things contained in the affidavit. Even if the court had refused to receive the affidavit in evidence and its refusal to do so was erroneous, the error would be cured by the admission of the oral evidence of the same witness covering the same facts covered by the affidavit, and, therefore, the exclusion of the affidavit of that witness would not be prejudicial to plaintiff in error. The third assignment of error presents in effect the question of the weight of the evidence upon this issue. The court of appeals found that no error intervened to the prejudice of plaintiff in error and affirmed the judgment. This court will not review the judgment of the court of appeals upon the weight of the evidence.

"An official return duly made upon process by a sworn officer, in relation to facts which it is his legal duty to state in it, is, as between the parties

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and privies to the suit \* \* \* conclusive of the facts stated therein, until vacated or set aside by due course of law." *Phillips v. Elwell et al.*, 14 Ohio St., 240.

The foregoing doctrine as announced in the case of *Phillips v. Elwell et al.*, *supra*, has been materially modified by this court in the case of *Kingsborough v. Tousley et al.*, *supra*, in which case it was held that, notwithstanding the rule as to legal presumption that obtains in favor of jurisdiction, "In an action on a personal judgment, whether rendered by a court of this state or elsewhere, it is competent to plead and prove in defense, though it be in contradiction of the record, that the defendant was not served with process, nor jurisdiction of his person otherwise obtained by the court rendering the judgment."

The court in that case distinguished between an action *in rem* and one "that involves merely a determination of the personal liability of the defendant." But that distinction is not here important for the reason that this plaintiff in error elected to proceed under the statute to obtain relief by an amendment of the return of the sheriff of service of summons in that case and prosecuted that form of relief to final judgment in the common pleas court and upon error in the court of appeals, and is now prosecuting error in this court to reverse the judgment of the common pleas court and the judgment of the court of appeals affirming the same. Having elected her remedy she is concluded by the judgment unless this court in this error proceeding reverses that judgment and the

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judgment of the court of appeals affirming the same.

It therefore follows that the trial court properly rejected evidence upon the same issue in the collateral suit.

It also appears from this record that a guardian *ad litem* was appointed for this minor defendant before she was duly and legally served with summons in this case. This would not effect the appearance of the minor nor give the court jurisdiction of her person. The appointment of a guardian *ad litem* is for the purpose of defense *after* appearance has been effected by service of process on infants. *Lessee of Moore et al. v. Starks, supra*. This guardian *ad litem*, however, did not file an answer until after legal process was complete. His appointment before service of process was irregular, and had she come into court in obedience to the summons legally served upon her she could have caused his removal and secured the appointment of another in his place, had she desired that to be done, but in view of the fact that at the time the answer of this guardian *ad litem* was filed she had been duly and legally served with process and made no objection whatever to the premature appointment of this guardian *ad litem*, or to his filing an answer in that capacity, she cannot now be heard to complain. The return as amended shows that the plaintiff in error was duly and legally served with process in the action of Charles Davidson against herself and Mary J. Davidson in cause No. 13818 on the civil docket of that court, and the fact that this return was not

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ordered amended prior to the judgment, or the next day or the next week or the next month after the judgment had actually been entered, is of no importance. The statute authorizing the court to order such an amendment does not limit the time in which such order may be made. It follows, therefore, that the only limitation of time that could apply would be the time in which evidence is available to establish the facts upon which the order of the court must be predicated. It is undoubtedly true that after a long lapse of time a court would be disposed to demand clear and convincing proofs before ordering the amendment of the return of process, particularly in contradiction of the facts stated therein, but in the particulars in which this return was ordered to be amended there is absolutely no conflict of evidence and no contradiction of the original return. The amendment ordered is merely supplementary thereto. The judgment in that case must be affirmed. The affirmance of this judgment practically determines the other case. While the record in that case presents other and further questions upon which either party might prevail in the absence of the former adjudication of the rights of the parties in this property, yet the fact that the judgment of the common pleas court in action No. 13818 on the civil docket of that court, quieting the title of Charles Davidson in and to these premises as against the claims of this plaintiff in error, is a valid and subsisting judgment, binding on the plaintiff in error and conclusive of her rights in the property described in the petition, necessarily



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disposes of the second case regardless of the other questions presented therein, and the judgment in that case is also affirmed.

*Judgments affirmed.*

NICHOLS, C. J., JOHNSON, WANAMAKER, NEW-MAN, JONES and MATTHIAS, JJ., concur.

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CASTLE v. MASON.

*Constitutional law—Operative effect of law determinative, when—Oil inspection—Lawful exercise of police power, when—Ohio inspection act unconstitutional—Clause 2, Section 10, Article I, U. S. Constitution—Interstate commerce.*

1. The constitutionality of a law may be determined by its operative effect, though on its face it may be apparently valid.
2. The state has full power to enact proper laws for the inspection of oils, gasoline, petroleum-ether and like substances; and legislation relating to such inspection, if otherwise valid, is not void as an unlawful exercise of its police power.
3. The Ohio inspection act, in so far as the same affects interstate commerce, contravenes clause 2, Section 10, Article I of the Federal Constitution and is unconstitutional and void for the reason that it imposes a burden on such commerce, by way of fees, largely in excess of the expenses necessary for executing the inspection law.

(No. 14637—Decided March 2, 1915.)

ERROR to the Court of Appeals of Franklin county.

This action was originally begun by the plaintiff in error in the court of common pleas and appealed to the court of appeals of Franklin county. In

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the latter court the defendant below, the defendant in error here, demurred to the amended petition for the reasons: (1) The plaintiff had no legal capacity to sue; (2) the amended petition did not state a cause of action. The court of appeals sustained the demurrer and dismissed the amended petition. From that judgment error is prosecuted to the supreme court.

The amended petition states that Castle is engaged in the manufacture and sale of oils and other petroleum products at Cleveland, Ohio, under the name of the Commercial Oil Company, states in detail the character of property and equipment used in a long-established commercial trade involving the purchase and sale of those products; that he "buys large quantities of petroleum oils, gasoline and naphtha from refineries in the state of Pennsylvania and elsewhere and has contracts and arrangements for such supplies which he is bound to consummate and can only do so through his established business without great loss." It further alleges that the defendant, as state inspector of oils, and his predecessors in office, have enforced an act passed by the general assembly on May 9, 1908, entitled, "An act to provide for the inspection of oils, gasoline and naphtha," now found in Sections 844-871 of the General Code; that the act is not a proper exercise of the state's police power for the reason that danger to life and property, through the proper use of those products as now manufactured, cannot exist; that the act is revenue producing in character, and that the total amount of fees and revenues collected and the actual, necessary expense

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disbursed under the provisions of the law from the years 1907 to 1913, both inclusive, are as follows:

Year.	Receipts.	Disbursements.	Revenue.
1907 .....	\$33,066	\$18,615	\$14,451
1908 .....	55,815	21,706	34,109
1909 .....	88,037	36,999	51,038
1910 .....	99,523	39,548	59,975
1911 .....	107,972	40,835	67,137
1912 .....	123,693	42,576	81,117
1913 .....	130,607	42,558	88,049
Totals ...	638,713	242,837	395,876

It is further alleged that the present inspection law, adopted in 1908, ratably increased the general fees for oil inspection and the incidental salaries and expenses beyond the fees, salaries and expenses theretofore paid, and statements from the reports of the inspectors are pleaded tending to show that the department regarded the operation of the law as a revenue producer, and that the receipts were largely in excess of inspection requirements. The pleading further alleges that the law, particularly Section 850, General Code, and the imposition of the tax thereunder, violates the spirit and letter of the Fourteenth Amendment and of clause 2, Section 10, Article I of the Federal Constitution; that it violates the various sections of the Ohio Bill of Rights, and particularly Sections 2 and 5 of Article XII of the Constitution of Ohio, in that the inspection fees charged are excessive and were intended for revenue purposes. It is also alleged that, because of the imposition of such inspection fees

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upon him as dealer in illuminating oils, he is unable to sell these products to railroad companies and paint and varnish makers for their own consumption for the reason that the latter may import these products from other states without the payment of inspection fees, and that thereby the plaintiff is denied the privileges of equal protection guaranteed by the fourteenth amendment of the federal constitution; that the defendant threatens to enforce the civil and criminal features of the act against him unless restrained by the courts, and he prays generally for relief against such enforcement and that the act be declared unconstitutional and void.

*Mr. C. D. Chamberlin and Messrs. Wilson & Rector*, for plaintiff in error.

*Mr. Timothy S. Hogan*, attorney general; *Mr. James I. Boulger* and *Mr. Clarence D. Laylin*, for defendant in error.

JONES, J. The question involved here is whether the provisions of the oil-inspection law contravene either the federal or state constitutions. The provisions of that act, so far as they may be germane to the determination of this question, are as follows: Section 850 of the General Code requires each owner of oil inspected to pay certain fees, graduated according to the amount inspected, ranging from a fee of fifty cents for single packages or barrels to seven cents per barrel of fifty gallons in lots exceeding fifty barrels.

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Section 853 requires the inspector to pay into the state treasury the moneys received after payment of salaries of himself and deputies and such other expenses incident to the conduct of his office. The inspector and stenographer are paid stated salaries and the deputies fees of three cents for each barrel inspected, but not to exceed \$1,200 per annum for each deputy in any one year.

Sections 854 and 865 provide that, before being offered for sale to customers for illuminating purposes, petroleum oils or products of which petroleum is a constituent element shall be inspected, whether manufactured in this state or not. Likewise gasoline, petroleum-ether and like substances having a lower flash test than illuminating oils must be inspected whether manufactured within or without the state, for which the same fees are charged as for the inspection of oils and which are likewise paid into the state treasury. The statutory test for oils, gasoline, etc., is a flashing test of 120 degrees Fahrenheit.

Other sections of the act provide for the inspection of oils shipped in tank cars, which may be inspected either at the refinery where manufactured, if within the state, or at the distributing station where shipped, at the discretion of the inspector. Other sections of the act provide penalties for violations of its provisions.

Assuming that the inspection act violates either the federal or state constitutions, the plaintiff, under the allegations of this amended petition, would be entitled to relief. He states that he is engaged at Cleveland, Ohio, in dealing com-

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mercially in petroleum oil and its products, and buys large quantities of such oils, gasoline and naphtha from the refineries in Pennsylvania and elsewhere, and that the defendant has charged arbitrarily large fees grossly in excess of the expense of the inspection. The plaintiff is seeking relief against the defendant as a ministerial officer of the state, whom he claims is acting under an unconstitutional law to the detriment of his business.

That a complainant may have relief by injunction in such a case against an officer of the state has been repeatedly decided. *Louisiana v. Jumel*, 107 U. S., 711, 758; *In re Tyler*, 149 U. S., 164; *Smyth v. Ames*, 169 U. S., 466.

It is contended by plaintiff that the enactment of the oil-inspection law was not a valid exercise of the police power, and that it contravenes the fourteenth amendment of the federal constitution. That state legislatures may enact laws for inspection or regulation, in relation to petroleum oils or its products, is not now open to question. So long as congress has not invaded the field of regulation or inspection this power is reserved in the state. It has the exclusive right to determine the necessity, policy and wisdom of requiring inspection in the interest of public safety. That kerosene oil, as now manufactured, may be nonexplosive is not vital. The fact that such may or can be manufactured or sold in dangerous forms is vital. For the same reason there is no force in the allegation of the amended petition that it is not a *proper* exercise of the police power for the reason that danger

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to life and property from the *proper* use of illuminating oils, gasoline and naphtha has not existed for years. The legislature had a right to consider the fact that there might be danger from improper use. Substantially similar reasons were plead in the bill filed in the case of *Red "C" Oil Mfg. Co. v. Bd. of Agriculture of North Carolina*, 222 U. S., 380, 383, but the law was upheld there as a proper exercise of the police power (s. c. 172 Fed. Rep., 695).

The amended petition discloses that, especially in the later reports of the state inspector, the fees for gasoline inspected were largely in excess of the fees collected from the inspection of oils; that without the gasoline inspection features, in such an event, there would be no appreciable excess of revenue over the expense of operation, in the inspection of petroleum oil products. Counsel for the inspector therefore intimate that the sections of the law relating to oils and gasoline are separate and distinct, and that therefore the oil-inspection receipts would substantially equalize the expense of the inspection department, and thus would be a valid enactment.

The adoption of this view, of course, would nullify that part of the act relating to the inspection of gasoline, petroleum-ether and like products for the obvious reason that the treasurer would thus receive about \$320,000 for gasoline receipts without a dollar's outlay for expense, which, in such view, would be charged entirely to oil inspection.

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This view of the law cannot be maintained. While the legislative history relating to inspection does not show that originally the inspection of oils was provided for, on May 9, 1908, the general assembly revised its entire inspection laws on the subject, providing for the inspection of petroleum and gasoline in the same act. No separation of those products was made, but each was made subject to the same laws, charged with the same fees, and the commingled receipts required to be paid into the state treasury. It is impossible, therefore, to regard the act as a separate and distinct act and severable, and the inspection features must either fall or stand as a single pronouncement of legislative intent.

The allegations of the amended petition disclose an increasing yearly net revenue in the operative effect of the inspection law. A law may be within the pale of constitutional authority when originally passed, yet because of its future operations it may directly contravene the organic law. As stated by Mr. Justice Harlan, in *Minnesota v. Barber*, 136 U. S., 313, 319, "There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void." To the same effect are *Brimmer v. Rebman*, 138 U. S., 78, and *Poindexter v. Greenhow, Treas.*, 114 U. S., 270.



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Article I, Section 10, clause 2, of the Federal Constitution provides: "No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

As heretofore stated, the facts admitted by the demurrer are that the receipts from inspection have been more than double the necessary disbursements for costs and expenses from 1907 to the present year. In that time the excess in receipts over disbursements has been \$395,876, and the yearly net revenues are continually increasing. Though not a part of the record, I may be permitted to add that the report of the state inspector for the current year of 1914, just filed, shows a net surplus of \$99,444.08 under this act. Under these circumstances the court feels warranted in holding that the resultant operation of the law is in direct and flagrant conflict with the federal constitution. We are not unmindful of the fact that if properly exercised the legislative purpose, in laying inspection duties, cannot be inquired into, and that, ordinarily, the amount of the inspection fee is not a judicial question; but it may be subject to judicial attack if the inspection charges are so unreasonable and disproportionate to the service rendered as challenge the good faith of the law, or where it is made clearly to appear that they are obviously and largely beyond what is needed to pay for the cost of inspection. *D. E. Foote & Co. v. Stanley, Comp. of the State of Maryland*, 232

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U. S., 494; *New Mexico, ex rel., v. Denver & Rio Grande Rd. Co.*, 203 U. S., 38.

It is not necessary that the legislature determine with exact nicety the amount of the inspection charges required to carry its purpose into execution. This is manifestly impossible owing to the varying fluctuations of trade. Mere excess in net surplus revenues is of itself no warrant in disturbing the law, nor would we feel disposed to hold that a flagrant excess in a single year over the expenses would invalidate it. What we do hold is, that under the facts disclosed here, where it appears that the fees are not only excessive but are being continued, yielding each and every year increasing net revenues, the natural operative effect of the inspection act thus shown is in direct violation of Article I, Section 10, of the United States Constitution, and consequently void. *D. E. Foote & Co. v. Stanley, Comp. of the State of Maryland, supra.*

The majority members of the court of appeals, in sustaining the demurrer to the amended petition, relied chiefly upon the case of *Red "C" Oil Mfg. Co. v. Bd. of Agriculture of North Carolina, supra.* In that case Chief Justice White quoted a dictum in *Patapsco Guano Co. v. North Carolina Bd. of Agriculture*, 171 U. S., 345, 354, as follows: "If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the legislature would moderate the charge."

Both cases are easily distinguishable from the present one. In the *Red "C" Oil Mfg. Co.* case the

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complaining party filed his bill two days after the inspection law took effect, and while the bill alleged that the tax was more than double the cost of inspection, the complaint was purely speculative. The defense of the board of agriculture, as disclosed by the answer in that case, was that the complaint was premature and that one year's test of the law would show the exact amount of receipts and cost of operation. It was upon these features of the case that the dictum named was based.

The defendant attempts to escape the effect of *D. E. Foote & Co. v. Stanley, Comp. of the State of Maryland, supra*, by the claim that the Ohio act does not interfere with interstate commerce; that the act imposes a charge upon oils, etc., that are sold in this state only, and that after products have been imported into Ohio by tank cars or otherwise they have then assumed a state of rest as intrastate commerce and may be taxed without violation of the federal provision. This is too narrow a construction of the facts pleaded and of the scope of the Ohio act. The act is not in terms made to apply to intrastate products, but applies generally to any and all oils, gasoline, etc., "whether manufactured in this state or not." The language employed would require inspection of products shipped into the state, and the features of the inspection would necessarily, though indirectly, impose a burden upon interstate commerce. The amended petition alleges that the plaintiff, though a dealer in Cleveland, Ohio, buys large quantities of those products in Pennsylvania and elsewhere, and has contracts and arrangements for such sup-

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plies. The general language used in the Ohio act is substantially similar to the North Carolina act in the *Red "C" Oil Mfg. Co.* case, *supra*, and to the Maryland inspection law, declared void in *D. E. Foote & Co. v. Stanley, Comp. of the State of Maryland, supra*. That inspection laws of this character impose a burden on commerce from other states, see *Brimmer v. Rebman, supra*.

Neither can the claim be sustained, under the allegations of the amended petition, that the products inspected under the act could be considered as having been incorporated with the general mass of property in the state and thus have lost their distinctive character as imports, and so become products of intrastate commerce. The fact is that Castle, at Cleveland, Ohio, was dealing directly with shipments of oil from Pennsylvania, and the products he received as such purchaser must, of necessity, have been shipped to him in original packages, which were required to be inspected before sale. So that neither the amended petition nor the inspection act can be susceptible to such a construction as would apply its provisions to packages which had become intrastate. *May & Co. v. New Orleans*, 178 U. S., 496.

We are, therefore, constrained to hold that the inspection act necessarily operates and imposes a burden upon commerce from other states, and that in so far as the same affects such commerce it violates the federal constitution and is unconstitutional and void for the reason that it imposes a burden on such commerce largely in excess of the expense necessary for inspection.

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In view of the conclusions which we have reached, we do not regard it necessary to pass upon the other questions presented.

Judgment of the court of appeals reversed, and cause remanded to that court with instructions to overrule the demurrer to the amended petition, and for further proceedings according to law.

*Judgment reversed, and cause remanded.*

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and MATTHIAS, JJ., concur.

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IN RE CONTEST OF THE SPECIAL ELECTION AT  
VILLAGE OF CHAGRIN FALLS.

*Elections—Opening and closing polls—Statutory provisions directory—Keeping polls open after statutory hours—Does not invalidate election, when.*

1. The provision of the statute fixing the time for opening and closing the polls at an election is directory and not mandatory. (*Fry v. Booth*, 19 Ohio St., 25, approved and followed.)
2. An election will not be invalidated by reason of the fact that the election officers, instead of closing the polls at 5:30 P. M. as directed by statute, kept the same open until 6:00 o'clock P. M., where there was no fraud or collusion and where there were not illegal votes cast after the time fixed by statute for closing sufficient to change the result of the election.

(No. 14636—Decided March 2, 1915.)

Error to the Court of Appeals of Cuyahoga county.

Facts are stated in opinion.

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*Messrs. Spear, Mills, Knight & Godfrey*, for plaintiff in error.

*Messrs. David & Heald*, for defendant in error.

NEWMAN, J. The only question for determination in this case arises upon a demurrer to the petition filed in an election contest proceeding begun in the probate court of Cuyahoga county. The demurrer filed by the mayor of the village of Chagrin Falls was sustained by the probate court and the contestant not desiring to amend or plead further judgment was rendered against him. Error was prosecuted to the court of common pleas and the judgment of the probate court there affirmed. This judgment of the court of common pleas was reversed by the court of appeals and the cause remanded to the probate court with instructions to overrule the demurrer and for further proceedings according to law. The mayor of the village has filed a petition in error in this court and seeks a reversal of the judgment of the court of appeals.

An election was duly and legally called to be held in the village of Chagrin Falls on August 2, 1913. The mayor in his proclamation, published according to law, notified the voters of the village to meet at the usual places of voting, two in number, on Saturday, August 2, 1913, between the hours of 5:30 o'clock A. M. and 5:30 o'clock P. M., central standard time, to vote upon the question as to whether the sale of intoxicating liquors should be prohibited in the village. On the day of the election a cloth banner was displayed in each of the polling places containing in large black type the

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following: "Special Election to-day, Polls open from 5:30 A. M. to 5:30 P. M."

The above facts appear in the petition and then follow these allegations:

"Your petitioner further represents to the court that the duly appointed judges of said special election, or one of them, caused to be erased on said printed banner, the printed figures 5:30, and under said figures in lead pencil, marked 6:00, so as to make said banner read as follows: '5:30 A. M. to 6:00 P. M.'

"Your petitioner further represents to the court that when the votes cast at said special election were counted, it was found and determined by the officers canvassing the votes of said special election, that the sale of intoxicating liquors as a beverage in said village was prohibited by a majority of two votes.

"Your petitioner further represents that the judges and clerks of said election, contrary to law, and in violation thereof, and contrary to the mayor's published proclamation of said special election, and contrary to the printed banners required to be displayed on each polling place, kept the polls open thirty (30) minutes longer than is provided by law, and as provided for and published in said proclamation, and on said printed banners.

"Your petitioner further represents to the court that after 5:30 P. M., central standard time, being the time fixed by law, by said proclamation and by said printed banners, a large number of votes were cast by the legally qualified voters of said village in favor of prohibiting the sale of intoxicating

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liquors as a beverage, in said village, which said votes so received by the election officers, after the lawful time for closing said polls, changed the result of said election; and had the law been observed and the polls closed at the time provided by law, by said proclamation and by said printed banners, the result of said special election would have been different than now appears upon the face of the poll books of said special election, and the sale of intoxicating liquors as a beverage in said village would not have been prohibited at said special election."

The petition prayed that notice be given to the mayor of the village of the pendency of the action and that on final hearing the court declare the election to be void and the returns certified by the election officers to be of no force and effect.

The sufficiency of the petition was challenged because of the failure to allege the presence of fraud or deception, that any legal voters were deprived of the opportunity to vote or that illegal voters were permitted to vote.

It is the contention of counsel for the contestant, the defendant in error here, that if, after the legal time for closing the polls, enough votes were cast to make different the result of the election from that result as computed from the votes cast at the hour the polls should have been closed according to law, then the election was void. It is alleged in the petition that had the polls been closed at 5:30 P. M. the sale of intoxicating liquors would not have been prohibited at said election.



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This election was held under the Beal local-option law, in which it is provided that the election shall be conducted as provided by law for the election of members of council of the municipal corporation where the local-option election is held.

Section 5056, General Code, as amended February 6, 1913 (103 O. L., 21), reads: "The polls shall be open at five thirty o'clock forenoon and kept open up to, and closed at, five thirty o'clock, central standard time, in the afternoon of the same day." Prior to the amendment the time of closing the polls was fixed by the statute at 6 o'clock.

There are certain provisions of law relating to elections and the conduct thereof which are mandatory, but those fixing the time for the opening and closing of the polls have been held uniformly to be directory merely, unless such provisions are declared to be essential by the statute itself. *Fry v. Booth*, 19 Ohio St., 25; *Montgomery v. Henry*, 144 Ala., 629, 1 L. R. A., N. S., 656, and the cases cited.

The purpose of a popular election is to ascertain the will of the electors as to a given proposition submitted to them or as to who shall serve them as officers. Where there is a fair and honest expression of the will of the electors and where there is no fraud and where no substantial right is violated, an election will not be invalidated by reason of a failure to follow directory provisions of the law. In the instant case it is not claimed that any votes were cast after the legal time for closing the polls which were not entitled to be cast had they been cast within the hours fixed by statute.

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It is conceded that the polls were not kept open by the election officers after the time fixed by law for the purpose of altering, changing or affecting in any way the result of the election, nor was there any fraud or collusion. It was simply an innocent noncompliance on their part with the directory provision of the statute relating to the closing of the polls, unaware, perhaps, of the fact that Section 5056 had been amended.

Was the purpose of this election—the securing of a fair and honest expression of the will of the electors as to whether intoxicating liquors should be sold as a beverage in the village—interfered with? From aught that appears in the petition every elector in the village voted. No one was deprived of his vote. No illegal vote was cast. There was no impediment or obstruction to a fair expression of the will of the electors.

In *Fry v. Booth*, *supra*, where the polls were closed “for the hour spent at dinner,” the court say that a departure from a strict observance of the provisions of the statute as to keeping open the polls does not necessarily invalidate the election where it appears that no fraud has been practiced and no substantial right violated.

Were the polls closed at a time earlier than that fixed by law and qualified voters were thereby prevented from voting, and it could be shown that the result of the election would have been materially changed had the polls been kept open up to the time fixed by law, then it might be said that there was an interference with the free and full expression of the majority. But keeping open the polls after

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the time fixed by law and permitting no one to vote except qualified voters does not have that effect.

The failure of the election officers to observe this directory provision of the statute did not render the votes of qualified electors cast after the time fixed by law illegal. Those cast after the time fixed by law were as expressive of the will of the electors as those cast before.

It not appearing in the petition that there was fraud, or that illegal votes were cast after the time fixed by law for closing the polls, or that any substantial right was violated, or that there was any interference with a fair and honest expression of the will of the electors, a cause of action is not stated. The probate court was correct in sustaining the demurrer, and the judgment of the court of appeals is therefore reversed and that of the common pleas affirmed.

*Judgment of the court of appeals reversed and that of the court of common pleas affirmed.*

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, JONES and MATTHIAS, JJ., concur.

## Statement of the Case.

## IN RE HARRY ALLEN.

*Repeal and amendment of statutes—Provisions continuous and undisturbed, when—Section 16, Article II, Constitution—Section 12672, General Code—Unlawful sale of cocaine—Penalty for second offense—Definite term and indeterminate sentence—Habeas corpus—Validity of indeterminate-sentence law cannot be raised, how.*

1. Where there is reenacted in an amendatory act provisions of the original statute in the same or substantially the same language and the original statute is repealed in compliance with Section 16, Article II of the Constitution, such provisions will not be considered as repealed and again reenacted, but will be regarded as having been continuous and undisturbed by the amendatory act.
2. The provision of Section 12672, General Code, as amended April 21, 1910, that where a person has been convicted of a second offense he shall be imprisoned in the penitentiary is not *ex post facto* or retroactive when applied to a case where the second offense was committed after the enactment of the provision for the punishment of the second offense although the first offense was committed prior to the enactment of such provision.
3. Where a person who is convicted of a crime under a statute prescribing punishment by imprisonment in the penitentiary for a definite number of years is given an indeterminate sentence the question of the validity of the statute authorizing such indeterminate sentence cannot be raised in a proceeding in *habeas corpus*.

(No. 14687—Decided March 2, 1915.)

APPLICATION for Writ of *Habeas Corpus*.

This is a proceeding in *habeas corpus* originating in this court. The petitioner, Harry Allen, represents that he is unlawfully restrained of his

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liberty by P. E. Thomas, warden of the Ohio penitentiary. A copy of the commitment is attached to the petition as an exhibit. The petitioner says that he is confined in said institution by reason of a sentence imposed on October 31, 1911, by the court of common pleas of Lucas county, Ohio, for the confessed illegal sale of cocaine, which offense was committed on March 9, 1911, the same being the first offense of said nature committed by him after the amendment of Section 12672, General Code, April 21, 1910 (101 O. L., 132). He admits that he had committed a like offense prior to April 21, 1910, and had been prosecuted and punished therefor.

He says that the court sentenced him to serve in the penitentiary "until released according to law," whereas the penalty for a first offense under Section 12672 was a fine of not less than fifty dollars nor more than five hundred dollars, and for each subsequent offense imprisonment in the penitentiary for a period of not less than one year nor more than five years.

He says that the sentence imposed upon him, under which he is confined in the penitentiary, was illegal and utterly void for the reasons that said offense being the first committed by him after the amendment of Section 12672, April 25, 1910, the court was without jurisdiction to impose a prison sentence and should have imposed a fine of not less than fifty dollars nor more than five hundred dollars, and because the sentence imposed by the court was an indefinite sentence and one which the

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court was without power to impose for the reason that that part of the law, Section 7388-6, Revised Statutes, empowering the court to impose an indefinite sentence, was repealed February 14, 1910, upon the adoption of the General Code, and further, if the court should hold said repeal not effective, then Section 7388-6 was unconstitutional and void, the same being in contravention of Section 11 of Article III and Section 1 of Article IV of the Constitution of Ohio, and did not confer upon the court any lawful authority to impose an indefinite sentence of imprisonment in the Ohio penitentiary, and, finally, because if said court had any power to pronounce a prison sentence upon him, then, under the mandatory provisions of Section 12374, General Code, said sentence should have been for a definite term of not less than one year nor more than five years, as provided in Section 12672, which minimum term of one year, the only one which this court can be absolutely certain would have been legally imposed by the court of common pleas as a definite sentence, has been long since served and completed.

The petitioner prays that a writ of *habeas corpus* be issued to said P. E. Thomas as warden, and that petitioner may be discharged from such illegal imprisonment and restraint.

P. E. Thomas, warden of the Ohio penitentiary, in his answer and return, admits that the petitioner is confined in the penitentiary and deprived of his liberty, but denies that he is unlawfully or wrongfully detained or held therein.

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*Mr. William K. Williams*, for petitioner.

*Mr. Timothy S. Hogan*, attorney general; *Mr. Walter L. Connors* and *Mr. James I. Boulger*, for P. E. Thomas, warden of the Ohio penitentiary.

NEWMAN, J. The petitioner was indicted under Section 12672, General Code, charged with the illegal sale of cocaine, the offense having been committed on March 9, 1911. He entered a plea of guilty and was sentenced indeterminately to a term of from one to five years in the penitentiary under the provisions of what is known as the old indeterminate-sentence law, Section 7388-6, Revised Statutes, and under this sentence he is now confined in the penitentiary.

Section 12672, as amended April 21, 1910, reads as follows: "Whoever sells, barter, furnishes or gives away any quantity of cocaine, alpha or beta eucaine or alypin, or any of their salts or compounds, or any preparation or mixture containing any of the aforesaid drugs or their salts or compounds of any of the combinations, of the same, \* \* \* shall be fined not less than fifty dollars, nor more than five hundred dollars, for the first offense, and for each subsequent offense shall be imprisoned not less than one year nor more than five years in the penitentiary."

The petitioner had been convicted and punished for an illegal sale of cocaine made on May 19, 1909. The statute under which he was then convicted did not contain the following language which appears in the amended statute: "for the

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first offense, and for each subsequent offense shall be imprisoned not less than one year nor more than five years in the penitentiary."

The provisions of the statute under which petitioner was first convicted were substantially re-enacted in the amended statute. In the latter the sale of additional drugs named therein is made criminal, the sale of cocaine, however, being prohibited both before and after the amendment. The principal difference is the provision for punishment of subsequent offenses by imprisonment in the penitentiary.

One of the grounds upon which petitioner predicates his right to a writ of *habeas corpus* is that the offense for which he is now serving sentence was his first offense under the *amended* statute, and he should therefore have been sentenced as a first offender notwithstanding his prior conviction under the statute before its amendment.

If the amendment to the statute abrogates and repeals the original law as to those parts which have not been altered in the amending act, then his contention is well founded, but not so if the amendment is simply a continuance thereof in so far as the language of both are identical or substantially so.

By the act of April 21, 1910, when this statute was amended, the original statute was repealed. This was done under the requirements of Section 16 of Article II of the Constitution as follows: "No law shall be revived, or amended unless the new act contains the entire act revived, or the sec-



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tion or sections amended, and the section or sections so amended shall be repealed."

As was said in *State, ex rel. Durr, v. Spiegel, ante*, 19, in reference to this constitutional provision: "The obvious purpose of this provision of the constitution was to avoid the confusion caused by the distribution of different parts of the same section in different enactments; but there was no intention to change the operation of the original section as to provisions which are not changed."

In *Eli et al. v. Holton*, 15 N. Y., 595, it is held that the effect of the amendment of a statute made by enacting that the statute "is amended, so as to read as follows," and then incorporating the changes or additions with so much of the former statute as is retained, is not that the portions of the amended statute which are merely kept without change are to be considered as having been repealed and again reenacted, nor that the new provisions or changed portion should be deemed to have been the law at any time prior to the passage of the amended act. The part which remains unchanged is to be considered as having continued the law from the time of its original enactment, and the new or changed portion to have become the law only at and subsequent to the passage of the amendment. To the same effect is the holding in *Moore v. Mausert et al.*, 49 N. Y., 332.

"When a statute amends a former statute 'so as to read as follows,' it operates as a repeal by implication of inconsistent provisions in the former law and of provisions therein omitted in the latter.

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When the amendatory act reenacts provisions in the former law, either *ipsissimis verbis* or by the use of equivalent though different words, the law will be regarded as having been continuous, and the new enactment, as to such parts, will not operate as a repeal, so as to affect a duty accrued under the prior law, although, as to all new transactions, the later law will be referred to as the ground of obligation." *In the Matter of the Estate of Prime*, 136 N. Y., 347.

In these New York cases it does not appear that in the amendatory statute there was an express repeal of an existing statute as there was in the statute in the case at bar, but the intention manifested in each instance by the legislature is the same. As is stated in Sutherland on Statutory Construction (2 ed.), section 238, where there is an express repeal of an existing statute and a reenactment of a portion of it, the reenactment neutralizes the repeal so far as the old law is continued in force. The intention manifested is the same as in an amendment enacted in the form "amended so as to read as follows," and where there is no express repeal. This author, in section 237, lays down the rule that the provisions of the amended sections which are merely kept without change are not to be considered as repealed and again reenacted but to have been the law all along.

In *State, ex rel. Durr, v. Spiegel, ante*, 22, it is said: "The presumption is that when the legisla-

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ture adopts an amendment it intends to make some change in the statute amended, and when it re-enacts the original statute as amended it has then made the only change it desires to make, leaving the rest of the provisions undisturbed."

This seems to be the general rule of statutory construction, and, applying it here, the provision of the statute making it an offense to sell cocaine otherwise than as pointed out by the statute was continued in force and was undisturbed by the amendment, the conviction of Allen for the offense committed March 11, 1911, was a second conviction under the statute and the provision for the punishment of subsequent offenses applied.

This statute was amended prior to the commission of the second offense. It does not provide additional punishment for an offense committed before its passage nor does it in any way affect previous crimes. It is applicable to crimes committed after its passage only, and affects all persons similarly situated.

In *Blackburn v. State*, 50 Ohio St., 428, the court had before it what was known as the habitual-criminal act (82 O. L., 237), which imposed life imprisonment upon one who had been previously twice convicted, etc. It was held that that statute in its operation did not conflict with Section 10 of Article I of the Constitution of the United States prohibiting *ex post facto* laws, nor with Section 28, Article II of the Constitution of this state, prohibiting retroactive laws, although one or both of the previous felonies charged against the accused

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had been committed and the imprisonment on account thereof inflicted before the statute in question was enacted.

What was said by the court in that case is pertinent here: "A law cannot properly be considered retroactive when it apprises one who has established, by previous unlawful acts, a criminal character, that if he perpetrates further crimes, the penalty denounced by the law will be heavier than upon one less hardened in crime. In such case the party is informed before he commits the subsequent offense of the full measure of the liability he will incur by its perpetration, and therefore does not fall within the class that is entitled to the protection afforded by the constitutional guaranty against the enactment of *ex post facto*, or retroactive laws, for the object sought by those guaranties, in respect to this kind of legislation, is that no transgressor of a penal statute, shall be subjected by subsequent legislation, to any penalty, liability or consequence, that was not attached to the transgression when it occurred."

Judge Cooley, in his work on Constitutional Limitations (7 ed.), page 382, says: "And a law is not objectionable as *ex post facto* which, in providing for the punishment of future offenses, authorizes the offender's conduct in the past to be taken into account, and the punishment to be graduated accordingly. Heavier penalties are often provided by law for a second or any subsequent offense than for the first; and it has not been deemed objectionable that, in providing for such

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heavier penalties, the prior conviction authorized to be taken into the account may have taken place before the law was passed. In such case, it is the second or subsequent offense that is punished, not the first."

See *McDonald v. Massachusetts*, 180 U. S., 311, and *Carlesi v. New York*, 233 U. S., 51.

The amended statute under consideration here did not have an unconstitutional operation as to the petitioner. It was not an *ex post facto* or retroactive law as to him. The court, under this statute, was authorized to impose a prison sentence.

It is the further claim of the petitioner that he should have had a definite sentence for a term of not less than one year nor more than five years, but the court, acting under Section 7388-6, Revised Statutes, imposed an indeterminate sentence. This, the petitioner contends, was without authority for the reason that Section 7388-6 was repealed and was not in existence at the time the sentence was imposed. Even if this be not true, it is urged that the indeterminate-sentence law was unconstitutional, being violative of Section 11 of Article III of the Constitution of Ohio, which vests the pardoning power in the governor, etc., and of Section 1 of Article IV, which vests the judicial power of the state in the courts. Whether the section was repealed or whether it was unconstitutional if not repealed, is unimportant, and it is wholly unnecessary to pass upon these questions in deciding this case.

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This is a proceeding in *habeas corpus*. A person unlawfully restrained of his liberty may prosecute a writ of *habeas corpus* to inquire into the cause of such imprisonment, but Section 12165, General Code, reads: "If it appears that the person alleged to have been restrained of his liberty is in custody of an officer under process issued by a court or magistrate, or by virtue of the judgment or order of a court of record, and that the court or magistrate had jurisdiction to issue the process, render the judgment, or make the order, the writ shall not be allowed; or, if the jurisdiction appears after the writ is allowed, the person shall not be discharged by reason of any informality or defect in the process, judgment, or order."

The trial court in the instant case had jurisdiction of the person of the petitioner. It had jurisdiction to try him for the offense charged and to sentence him to a term in the penitentiary under Section 12672. Instead there was an indeterminate sentence imposed of which the petitioner complains. If this were erroneous, the error committed by the court related to the sentence and punishment only and was not a jurisdictional one. The court merely entered and enforced a wrong judgment. Admitting then, for the purpose of this case, that there was no authority to impose the sentence, either by reason of the repeal of the indeterminate-sentence law or its unconstitutionality, the punishment inflicted was erroneous and voidable but not void. The sentence and punishment could have been corrected in a proceeding in error

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challenging the judgment of the court. The petitioner had ample opportunity to avail himself of the objections as to the sentence which he attempts to make here. A *habeas corpus* proceeding cannot perform the functions of a writ of error.

Judge Swan, in *Ex parte Shaw*, 7 Ohio St., 81, says: "The writ of error and *habeas corpus* have each their separate offices. There are ample remedies provided for the correction of irregularities and errors in proceedings which result in conviction and in sentences, by writ of error. For errors and irregularities in such cases, the summary remedy by *habeas corpus* cannot be had."

In *Ex parte Van Hagan*, 25 Ohio St., 426, the petitioner had been sentenced under a statute not in force, although another statute covered the offense. The punishment inflicted was an imprisonment for a term longer than that authorized by the then existing statute. It was held: "*Habeas corpus* is not the proper mode of redress, where the relator has been convicted of a criminal offense, and sentenced to imprisonment therefor \* \* \*; if errors or irregularities have occurred in the proceedings or sentence, a writ of error is the proper remedy." The court in that case say: "The punishment inflicted by the sentence, in excess of that prescribed by the law in force, was erroneous and voidable, but not absolutely void. It follows that a writ of error to reverse the proceedings or sentence is the remedy that the relator should have resorted to in order to obtain a discharge from illegal imprisonment, and not *habeas corpus*, which

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is not the proper mode of redress where the relator was convicted of a criminal offense and erroneously sentenced to excessive imprisonment therefor by a court of competent jurisdiction." *In re Lincoln*, 202 U. S., 178; *In re Bishop*, 172 Mass., 35; *In re Stalker*, 167 Mass., 11; *Ex parte Spencer*, 228 U. S., 652.

The fact that the minimum term of imprisonment for which petitioner could have been sentenced under Section 12672 has expired does not affect the rule. *In re Schuster*, 82 Wis., 610, 52 N. W. Rep., 757; *In re Shinski*, 125 Wis., 280, 104 N. W. Rep., 86.

For the reasons we have given there was authority to impose a penitentiary sentence on the petitioner. If the indeterminate-sentence law was inapplicable for any reason and the sentence was not in accordance with the provisions of Section 12672, those questions could have been presented in an error proceeding. *Carey v. State*, 70 Ohio St., 121. They cannot be raised here and the errors complained of reviewed upon *habeas corpus*.

The prayer of the petitioner is therefore denied and the writ refused.

*Writ refused.*

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, JONES and MATTHIAS, JJ., concur.



## Opinion of the Court.

## IN RE GEORGE WINSLOW.

*Criminal law—Conviction for burglary—Indeterminate sentence to penitentiary—Claim of illegal detention—Application for habeas corpus—Sentence erroneous but not void, when—Sections 2166, 12374, 12438 and 13767, General Code—Section 7388-6, Revised Statutes.*

(No. 14688—Decided March 2, 1915.)

APPLICATION for Writ of *Habeas Corpus*.

*Mr. William K. Williams* and *Mr. Louis B. Houck*, for petitioner.

*Mr. Timothy S. Hogan*, attorney general; *Mr. Walter L. Connors* and *Mr. James I. Boulger*, for P. E. Thomas, warden of the Ohio penitentiary.

BY THE COURT. George Winslow, who is confined in the Ohio penitentiary under an indeterminate sentence imposed on him June 11, 1913, by the court of common pleas of Licking county, for burglary committed February 8, 1913, files an application in this court for a writ of *habeas corpus*. He asks that the same be issued to P. E. Thomas as warden of the Ohio penitentiary, by whom he claims to be unlawfully restrained of his liberty. He was sentenced to remain in the penitentiary "until discharged by due process of law." He says that his sentence should have been for a definite term, in accordance with the provisions of Section 12374, General Code, and should have been for not less than one year nor more than fifteen years under Section 12438.

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His contention is that the sentence under which he is now confined in the penitentiary was and is illegal and utterly void in law. He says the only acts of the legislature empowering courts to impose indeterminate sentences were Section 7388-6, Revised Statutes, and Section 2166, General Code, as amended February 13, 1913, effective May 13, 1913.

He insists that Section 7388-6, Revised Statutes, was repealed February 14, 1910, upon the adoption of the General Code, the repealing section being 13767; that if it were not repealed, it was ineffective as to him, as he had previously served a term in a penal institution.

He further claims that both Section 7388-6, Revised Statutes, and Section 2166, General Code, are in contravention of Section 11 of Article III and Section 1 of Article IV of the Constitution of Ohio, the former vesting the pardoning power in the governor and the latter the judicial power in the courts of the state, and finally that Section 2166, which did not become effective until May 13, 1913, conferred no authority upon the court to impose an indeterminate sentence upon him for a crime committed February 8, 1913, for the reason that said statute, if applied to his case, would in its operation contravene the provision of Section 10 of Article I of the Constitution of the United States prohibiting the enactment of an *ex post facto* law.

It is unnecessary in determining whether the relief sought here should be granted to consider

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the constitutionality of the indeterminate-sentence laws or whether either of them was effective as to the petitioner. He was indicted, tried and convicted under the burglary statute, Section 12438, General Code. The punishment therein prescribed is imprisonment in the penitentiary not less than one year nor more than fifteen years, and the trial court had authority to impose a prison sentence. If the court in sentencing him did not act under this statute, but sentenced him under another statute, which for the purposes of this case may be conceded to have been invalid, the sentence was erroneous and voidable but not void. The error was not a jurisdictional one and it cannot be reviewed in a proceeding in *habeas corpus*. This is in accordance with our holding in *In re Allen*, ante, 315.

The writ, therefore, must be denied and the prayer of the petition refused.

*Writ refused.*

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

## Statement of the Case.

## THE CITY OF CINCINNATI v. THE PUBLIC UTILITIES COMMISSION.

*Public utilities commission—Powers and duties—Municipal ordinance directing extension of street railway lines—Section 614-51, General Code—Commission may relieve company of ordinance obligations, when—Order of commission will not be reversed by supreme court, when.*

1. The requirements of a city ordinance, directing a street railway company to construct extensions of its lines, are subject to review by the public utilities commission, which is authorized, upon hearing, to determine whether the requirements of such ordinance are just and reasonable.
2. Under the provisions of Section 614-51, General Code, the public utilities commission may determine the practicability of additions and extensions of street railway lines required by a city ordinance. In reaching such determination the commission may consider the physical conditions of the proposed route as well as the necessary plan of operation of cars thereover. If upon such hearing the commission finds that operation of cars over the proposed route would entail unusual and unwarranted dangers and jeopardize the lives of passengers, it is authorized to relieve the street railway company from the obligations sought to be imposed by the ordinance complained of. Such order of the commission will not be reversed upon review by this court when it does not appear from a consideration of the record that it is unlawful or unreasonable.

(No. 14691—Decided March 9, 1915.)

## ERROR to the Public Utilities Commission of Ohio.

On December 16, 1913, the council of the city of Cincinnati passed an ordinance, No. 701, 1913, which, in substance, directed The Cincinnati Street Railway Company and The Cincinnati Traction Company within seventy days after the passage of

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the ordinance to construct a double-track extension over the so-called Warsaw avenue route from the intersection of Glenway avenue and Wilder avenue northwestwardly and westwardly over Glenway avenue to the intersection of Glenway and Seton avenues.

The companies named filed their complaint with the public utilities commission under Sections 614-44 and 614-46 of the General Code. They contend that such ordinance should not be enforced against them for the reason that the requirements of the ordinance are unjust and unreasonable; that thereby said companies are required to construct and maintain a street railway line over Glenway avenue, which is unstable and unsafe, due to the sliding character of the ground and extreme grade; that the construction of the Glenway avenue route as proposed involves unusual operating difficulties with respect to grades, curves and otherwise, and that operation thereon would jeopardize the lives of passengers.

To the complaint of said companies the city of Cincinnati filed its answer before the commission in which it insists that the ordinance in question is just and reasonable in its requirements, and denies that the portion of Glenway avenue over which the ordinance directs the construction and operation of said street railway line is unstable or is of extreme grade, or that its operation would jeopardize the lives and limbs of passengers.

Upon the issues thus made the case was heard by the public utilities commission, at the conclusion

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of which hearing the commission found that the additions and extensions required by said ordinance were not practicable and ordered that said The Cincinnati Street Railway Company and The Cincinnati Traction Company be relieved from any and all obligations imposed by said ordinance and that said ordinance be held for naught.

Thereupon the city of Cincinnati filed in this court its petition in error, seeking to have this court set aside and reverse the order made by the public utilities commission and order a dismissal of the appeal of The Cincinnati Street Railway Company and The Cincinnati Traction Company.

*Mr. Walter M. Schoenle*, city solicitor, for plaintiff in error.

*Mr. Timothy S. Hogan*, attorney general, and *Mr. Joseph McGhee*, for public utilities commission; *Mr. Joseph Wilby* and *Mr. Ellis G. Kinkead*, for defendant in error.

MATTHIAS, J. The ordinance in question was passed under authority of Section 614-51, General Code. That section also provides that the requirements and orders of the city council, respecting additions and extensions by public utilities, shall be subject to review by the public utilities commission.

Upon the hearing of this matter considerable evidence was adduced before the commission, and it viewed the territory and inspected the proposed route and also observed the operation of cars over the Warsaw avenue route.

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This proceeding comes into this court by virtue of Section 544, General Code, which provides that "A final order made by the commission shall be reversed, vacated or modified by the supreme court, on a petition in error, if upon consideration of the record such court is of the opinion that such order was unlawful and unreasonable."

Under Section 542 of the General Code such order of the commission must be regarded as *prima facie* reasonable. It is to be borne in mind then, at the threshold of our consideration of this case, that the presumption obtains of regularity of the proceedings of the public utilities commission, and that its conclusions were fully justified by the evidence before it. If, therefore, it does not appear from the record that the order made herein by the public utilities commission was an unlawful and an unreasonable one it is the duty of this court to affirm its action.

Apparently there is no contention before the commission as to the real necessity for the provision of additional service to meet the demands of passenger traffic to and from Price Hill, a residence section of the city of Cincinnati. Efforts had been made, both by the city authorities and these companies, to provide some additional service over what is known as the Warsaw-Elberon avenue route, which would require an extension of the Elberon avenue line, now in operation, from Eighth street to Warsaw avenue; but it was impossible to procure the necessary consent of property owners

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along that section of Elberon avenue. Hence the relief sought could not be obtained over that route.

In the hearing before the commission apparently all questions were eliminated save that of danger growing out of the operation of the proposed line from Wilder avenue to Seton avenue. Two elements of danger of operation were presented to and considered by the commission. The evidence shows that Glenway avenue for a distance of fifteen hundred feet above its intersection with Wilder avenue has a nine per cent. grade, and that portions thereof have been built upon filled ground, by reason of which condition slides have become apparent. Skilled experts, who had examined and investigated the conditions with care, testified that if the proposed double-track line be constructed the added weight would inevitably make such sliding of the street more frequent and more pronounced, and would render the operation of cars thereon dangerous.

The other element of difficulty and danger arises from the necessary operation of the proposed line over the "balloon loop," an ingenious combination of tracks of balloon shape at the intersection of Glenway avenue and Wilder avenue where the Warsaw avenue line makes such a sharp turn that this arrangement of tracks is required.

The operation of the proposed Glenway avenue line would require that the outgoing cars cross the "balloon loop" at two intersections and, under the proposed method of operation, the inbound cars would take their course over what is now a part of



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this "balloon loop" track. Then all cars over the proposed line, as well as those over the Warsaw avenue line, would pass either over or through the "balloon loop."

Under the present operation, during the best weather conditions, the number of cars passing through the "balloon loop" and which must use the same piece of track, is from sixty to seventy per hour, which the evidence shows is as many as may safely be operated under present conditions.

The proposed line would not afford any relief unless more cars be used than are now employed. If more cars cannot be safely used through the loop it seems clear that the danger would be augmented somewhat by taking cars across the loop, and at the same time continue the required operation of cars over the Warsaw avenue line.

The record shows that the proposed Glenway avenue line would strike the "balloon loop" at a grade of nine per cent. and that such grade extends fifteen hundred feet above the loop. From the evidence before them, and actual inspection of the situation, the members of the commission found the conditions at that point to be such that an order that would cause further congestion would entail a hazard that should not be imposed.

It was contended by the city that the dangers of operation on account of the steep grade could be obviated, or at least minimized, by placing a derailing switch four hundred feet above the "balloon loop." If that be done there would still be a nine per cent. grade extending to the "balloon loop." It

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was found by the commission that in most of this distance of four hundred feet it would not be possible for the motorman to see far across the "balloon loop" and up the other side and observe Warsaw avenue cars coming down.

There was evidence that the sliding of Glenway avenue could be prevented by the erection of retaining walls, and it is contended that the commission should have entered a decree approving the ordinance upon the condition that the city construct the necessary retaining walls. The record does not disclose evidence from which the commission could have determined the character, size or location of retaining walls necessary to prevent sliding of the street. It was suggested during the hearing that such requirement be made of the city, but the statute authorizing a review of such ordinance by the public utilities commission does not confer upon the commission any power to legislate for the city or to require the municipal authorities to construct any improvement or exact the performance of any duty by them. Jurisdiction is conferred upon the commission to hear and determine whether the requirements and orders of the council, as to additions and extensions by public utilities, are unjust and unreasonable. These requirements were embraced in the ordinance and were brought into question by the complaint of the street railway companies. Under its terms, plans of construction of these extensions are required to be submitted by the companies within seventy days and the work of construction to begin within forty days after the ap-

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proval of such plans. When the issue was made before the commission it was authorized to inquire into conditions affecting the matter of the proposed extension and pass upon the justness and reasonableness of the requirements of the ordinance. It had no other duty and can exercise no further power in relation to such matter. It is authorized only to pass upon conditions presented by the evidence and to determine whether or not such ordinance is, in its requirements, just and reasonable, and whether it should be enforced against such public service companies.

It is urged too that the court may, and should, modify the order of the commission in the regard stated, but there is no evidence in the record upon which, if authorized, the commission or this court could base such conditional decree approving said ordinance. Furthermore, the erection of retaining walls would not meet the second serious element of danger found by the commission rendering the proposed extension impracticable — the increased operation of cars through the “balloon loop.”

From a consideration of the record it cannot be concluded that the order of the commission is unjust or unreasonable. It is, therefore, affirmed.

*Judgment affirmed.*

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and JONES, JJ., concur.

## Statement of the Case.

ELLARD, EXECUTOR, v. FERRIS, EXECUTOR AND  
TRUSTEE, ET AL.

*Wills—Gift to legatee by testator—Subsequent to date of will—Presumption of intended ademption by testator—Where legatee is child of testator—Or one standing in loco parentis to testator—Legacy to one other than child—Intention of ademption—Must be clearly shown by will or extrinsic evidence.*

1. Whether a gift made to a legatee by a testator subsequently to the date of the will is to be taken as an ademption of the legacy depends on the intention of the testator.
2. Where the subsequent gift is made to a child, or one to whom the testator stands *in loco parentis*, and the gift is of the same character or for the same purpose as the legacy, it will be presumed to be an ademption of the legacy *pro tanto* in the absence of an expressed intention to the contrary shown by the will or by extrinsic evidence.
3. Where the legacy is to a person other than a child of the testator, or to a person other than one to whom he stands *in loco parentis*, unless the gift is for the same specific purpose for which the legacy was intended, there is no presumption of such intention, but it must be clearly shown, either from the will itself or by extrinsic evidence, that the ademption was intended by the testator.

(No. 14535—Decided March 9, 1915.)

ERROR to the Court of Appeals of Hamilton county.

Aaron A. Ferris, executor and trustee under the will of Elizabeth Zinn, filed his petition in the common pleas court asking the direction of the court as to whether the sum of \$2,000 which was paid out by the deceased under circumstances set out in the petition should be treated by him as a gift to Vir-

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ginia G. Ellard, the sister of the decedent, or as an advancement to be charged against her interest in the estate. The petition alleged that in making distribution of the estate the executor proposed and sought to charge against the interest of Virginia G. Ellard the amount stated, with interest from the date of the probating of the will, the interest of Mrs. Ellard as legatee being one-fifth; that the executor based his action in so charging that amount against the share of Mrs. Ellard upon a certain receipt executed and delivered by her to the testatrix in her lifetime; that a copy of the receipt is as follows:

"Cincinnati, May 23, 1907.

"Received of my sister, Elizabeth Zinn, her draft for \$2,000 on account of my future interest in her estate.

"VIRGINIA G. ELLARD."

The petition avers that Mrs. Ellard objected to the proposed action of the executor and claimed that the \$2,000 was paid over to her voluntarily by the testatrix as a gift and that the testatrix did not intend that the amount should ever be charged against the interest of Mrs. Ellard in her estate; that Mrs. Zinn fully intended that the \$2,000 should be an absolute gift and not chargeable against the interest of Mrs. Ellard; that some of the legatees in the said will objected to the allowance by the executor of said \$2,000 to Mrs. Ellard as a gift as claimed by her and insist that he charge the same against her interest as an advancement. The petition sets forth the proportions of the estate to which

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the different parties were entitled by the terms of the will and a copy of the will is attached to the petition.

Mrs. Ellard, who was then living, filed her answer, in which she avers that some time prior to May 23, 1907, the testatrix agreed to give Mary E. Hoffman, a daughter of the defendant and a niece of the testatrix, the sum of \$2,000 as a present to enable said Mary E. Hoffman to purchase a house when she should find one which would suit her, it being understood and agreed that the defendant, Mrs. Ellard, and her husband, parents of Mrs. Hoffman, would furnish the balance of the money required to make the purchase; that Mrs. Hoffman resided, at the time the agreement was made, with her husband in the state of Massachusetts; that prior to the date named and after the agreement was made Mrs. Hoffman found such a house, which she agreed to purchase for the sum of \$6,500, of which Mrs. Zinn was advised; that thereafter and prior to May 23, 1907, in consideration of her promise, Mrs. Zinn delivered to the defendant, Mrs. Ellard, a draft for the sum of \$2,000, payable to the order of the defendant in trust for said Mary E. Hoffman, which Mrs. Zinn requested the defendant to endorse and forward and deliver to said Mary E. Hoffman; that the defendant, in compliance with that request, did, prior to the day named, endorse, forward and deliver the draft to Mrs. Hoffman as requested, and that the defendant and her husband gave the said Mary E. Hoffman the balance, to-wit, the sum of \$4,500; that thereafter

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Mrs. Hoffman completed the purchase of the property, paying therefor the sum of \$6,500, using the \$2,000 so given to her by Mrs. Zinn for that purpose; that thereafter, on May 23, 1907, this defendant was requested to give a receipt to the said Elizabeth Zinn for the \$2,000 so received and that the receipt set forth in the petition was given by her in compliance with that request and for no other purpose; that this defendant received no part of said \$2,000 herself and received no benefit whatever from the gift made by the testatrix to Mrs. Hoffman; that the testatrix by her last will, which was duly probated, disposed of all the real and personal property of which she died seized. The answer prayed for the payment to her of the sum of \$2,000 retained by the plaintiff.

Answers were filed by other defendants asserting that the \$2,000 referred to was an advancement to Mrs. Ellard, and this was the issue in the case.

The court of common pleas found the issues in favor of Mrs. Ellard; that the \$2,000 could not be charged against her interest in the estate and directed the executor to proceed accordingly. The case was appealed to the circuit court, and its successor, the court of appeals, found upon the issues in favor of Mr. Ferris, the executor and trustee under the will of Mrs. Zinn. Mrs. Ellard having died in the meantime, the suit was revived in the name of her executor, George B. Ellard, plaintiff in error herein. This proceeding is brought to reverse the judgment of the court of appeals.

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*Messrs. Healy, Ferris & McAvoy*, for plaintiff in error.

*Mr. Rufus B. Smith; Messrs. Bruce & Bruce; Mr. A. A. Ferris and Mr. John J. Weitzel*, for defendants in error.

JOHNSON, J. The dispute in the courts below was confined practically to questions of law. The testimony offered by each party on the trial related to phases of the controversy which were different from those to which the testimony of the other related. There is, therefore, no material conflict in the evidence.

In 1905 Mrs. Zinn, the testatrix, was an old lady of considerable wealth without lineal descendants. Her husband had died in 1880 and her only son in 1902. While visiting her niece, Mrs. Hoffman, in Massachusetts in August, 1905, she promised to give her \$2,000 to assist her in the purchase of a house. Mrs. Hoffman was the daughter of Mrs. Virginia Ellard, who was Mrs. Zinn's sister. Mrs. Zinn at other times referred to and repeated her promise to give her niece the amount named for the purpose stated. In April, 1907, she wrote her niece inquiring about the house-hunting and stated in the letter "I will keep my word when you decide what you want." In the following month Mrs. Hoffman notified her aunt that she had arranged to buy a house. Thereupon Mrs. Zinn went to the office of Mr. A. A. Ferris, who had been for many years



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her attorney and counsel, having charge of her large estate and making monthly reports to her. Mr. Ferris testified that she said she wanted to help Mrs. Hoffman through Mrs. Ellard to buy a house, and wanted to get \$2,000 for that purpose. After stating that it could be borrowed, Mr. Ferris suggested that there should be some evidence of it, and Mrs. Zinn said, "Put it in a note." Mr. Ferris afterward prepared a note, enclosed it with a draft for the amount, and forwarded it to Mrs. Zinn at her residence, with the suggestion that Mrs. Ellard should sign the note. Within a day or so Mrs. Zinn endorsed and gave the draft to Mrs. Ellard at her house and said, "I have fulfilled my promise, here is the two thousand dollars for Mamie," and then said that Mr. Ferris had suggested that Mrs. Ellard should sign the note. This Mrs. Ellard refused to do and it was not signed. She left Mrs. Zinn's house with the draft, stating to Mrs. Zinn, "I will mail this to Mamie on the first mail," to which Mrs. Zinn made no objection. The draft was mailed the next day. Mrs. Zinn called on Mr. Ferris, told him what had occurred and that she had finally delivered the draft. Mr. Ferris again remarked that there should be some acknowledgement from Mrs. Ellard for the \$2,000. After some further talk Mrs. Zinn, at Mr. Ferris' suggestion, directed him to stop payment of the draft, which he did. He then wrote a letter to Mrs. Ellard in which he assured her that there was no intention to sue on the note when due and stated that he had stopped payment of the draft and enclosed a blank

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receipt, saying, "You can, if you please, fill it out yourself, giving the form of it, it being only necessary that you should express in some words that you have received the \$2,000.00." Mrs. Ellard then herself wrote the receipt, a copy of which is above set out in the statement of the case, and it was sent to Mr. Ferris. As to this Mr. Ferris testified: "The next morning I called up Mrs. Zinn, and I don't think I read the receipt over to her, but I told her the receipt was in my possession and that it covered the ground." So far as shown, Mrs. Zinn never saw the receipt and never knew its terms. Subsequently Mrs. Zinn expressed her satisfaction that she had assisted her niece in the purchase of the house, and on September 21, several months afterwards, she wrote to her brother a letter in which she stated "I gave Mamie \$2000, two thousand dollars, towards the payment of her house lately."

The will of Mrs. Zinn was made in August, 1906, the draft for the \$2,000 was delivered May 21, 1907, and she died in February, 1908.

In support of the judgment of the court of appeals it is contended that the real issue is whether parol evidence can be admitted to vary the terms of what defendant in error claims is a written contract; that is to say, the paper signed by Mrs. Ellard after the time the draft for \$2,000 was delivered to her.

It is insisted that the cases of *Jackson v. Ely, Exr.*, 57 Ohio St., 450, and *Cassilly v. Cassilly*, 57 Ohio St., 582, rule the question as to the admissibility of the testimony referred to.

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In *Jackson v. Ely, Exr.*, Mrs. Jackson signed the following paper :

“\$15.50                      Wooster, Ohio, May 13, 1890.

“This is to certify that I have this day settled with John Ely, and he has paid me all he owed me, up to this date, and I have no claims or demands against him of any kind whatsoever.”

The court held that this instrument was not merely a receipt but an agreement that the parties had come to a settlement. There had been mutual obligations between them and the court points out that a “settlement” is a contract between two parties by means of which they ascertain the state of the accounts between them. Full consideration had passed from each side.

In *Cassilly v. Cassilly*, Mrs. Cassilly signed a paper in which she contracted to transfer to her son all interest that she had in the estate of her deceased brother. The court held that the paper embodied a contract which could not be contradicted by parol evidence. In both of the cases referred to there were valuable considerations moving from and to each of the parties. They had reduced their contracts with reference to the matters to writing, and when the court concluded that the instruments were not merely receipts but embodied contracts it followed that parol evidence was not admissible to vary their terms.

As to the paper involved in this case the parties did not sustain towards each other any contractual

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relationship whatever. Before the paper was signed Mrs. Zinn was not obligated to give Mrs. Ellard any interest in her estate whatever, and after the paper was signed Mrs. Zinn could have refused to give Mrs. Ellard any portion of her estate or could have given her all of her estate. On the other hand, Mrs. Ellard did not assign or release anything that she had. *Nemo est haeres viventis*. There is not present any of the grounds upon which the rule which excludes parol evidence with reference to written instruments is based. The evidence offered was admissible to explain the circumstances under which the paper referred to was made and delivered, as well as to show the intention of the testatrix in making the gift.

Although the paper signed by Mrs. Ellard is not a legal contract, release or assignment, still it might well be held to work an estoppel against her if the circumstances under which the money was paid, and the paper signed and delivered, were such as to furnish the basis for the application of that doctrine. This was the holding in *Rosenthal v. Mayhugh*, 33 Ohio St., 155, cited by the defendant in error and referred to later in this opinion. But in that case there was a complete finding of facts from which, as shown later on herein, the court found all the elements of estoppel. Evidence was received showing all of the circumstances connected with the transaction. But it is averred in the answer of Ferris, trustee, that the \$2,000 was advanced to Mrs. Ellard and received by her with the intention and for the purpose of satisfying and adeeming the

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bequest to Mrs. Ellard in the will of Mrs. Zinn to the extent of the sum so advanced.

An advancement is a gift *in praesenti* of money or property to a *child* by a *parent* to enable the donee to anticipate his inheritance *pro tanto*, and applies to cases of intestacy. Ademption is the extinction or withholding of a legacy in consequence of some act of the testator. A gift will be taken as an ademption only when made to a child or one to whom the testator stands *in loco parentis*. The rule seems to be universal, as shown by the cases cited in the briefs, that the matter of an ademption depends wholly on the intention of the testator; that where a legacy is given by the testator to a child, or to one to whom he stands *in loco parentis*, a subsequent payment made to the child raises the presumption of an intention on the part of the testator to adeem the legacy in whole or in part, but that in case of a legacy to a person other than the child of the testator, or to one to whom he does not stand *in loco parentis*, a subsequent gift to the legatee raises no presumption of an intention of the testator to satisfy the legacy unless the gift is for the same specific purpose for which the legacy was designed, or is in terms made a substitute therefor, but it must be made to appear clearly, either from the will or by extrinsic evidence, that such satisfaction was intended. 40 Cyc., 1916.

The doctrine of ademption is applied on the same principle as that of advancements in cases of intestacy, and is founded on the presumption that a parent intends that all of the natural objects of his

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bounty shall share equally in his estate, and that where he makes a gift to a child or to one to whom he stands *in loco parentis* of property or money which he has devised or bequeathed to such child or person he intends to adeem, "*to take away*," the legacy in whole or in proportion to the value of the gift. The relationship creates the presumed intention, but it does not arise in the case of one not sustaining that relationship, although the actual intention may always be shown by evidence.

In this case the question whether the gift was an ademption depends solely on the intention of Mrs. Zinn, the testatrix. *That* is the important — the *decisive* — question in the case. It is wholly immaterial what the intention of the legatee was in the receiving of the gift to be delivered to her daughter, unless the circumstances surrounding the making of the gift would tend to establish that the testatrix shared the intention of the legatee. As shown, the rule is that it must be made to appear that the testatrix herself intended that the gift of the \$2,000 was an ademption of the legacy contained in the will for Mrs. Ellard.

As already indicated, there is no dispute in the testimony as to any material fact. The dispute relates to the conclusion to be drawn from undisputed evidence.

The evidence, oral and written, that Mrs. Zinn intended to give the \$2,000 to Mrs. Hoffman, the niece, as an unqualified gift, and that she afterwards and always regarded it in that light, is clear and undisputed. It is also clear that while she

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acquiesced fully in the suggestion of her attorney, which was entirely proper and creditable to him, that she request some sort of written acknowledgment from Mrs. Ellard when the draft was delivered to her for transmission to her daughter, she did not see the receipt that was signed by Mrs. Ellard, did not know its terms, took no interest in it after it was signed and never did anything or said anything that would indicate that she intended that the \$2,000 which she declared she had given her niece should be charged against the legacy which she had made to her sister by her will.

Inasmuch as the legatee was not a child and was not one to whom she stood *in loco parentis*, and inasmuch as the rule is clear that in such circumstances it must be made to clearly appear that the testatrix intended that the gift of \$2,000 should operate as such ademption, we are constrained to hold that it cannot be so treated.

Cases are cited in support of the judgment below in which receipts signed by children were delivered to a testator in his lifetime which purported to be releases in full or in part of the child's interest in the estate and in which it was held that the amounts received should be charged against the interest of the legatee. These authorities are not in conflict with the principles which we regard as controlling the case we have in hand.

In *Glasscock v. Layle et al.*, 21 Ky. Law Rep., 860, 53 S. W. Rep., 270, cited by defendants in error, money was paid to a son by his mother's agent.

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The son executed and delivered to the agent the following receipt:

“Williamstown, July 27, 1889.

“Received of N. Webster four hundred dollars as my interest in my mother’s estate.

“N. B. LAYLE.”

It was contended that the \$400 was an ademption of the devise to Layle in the will of his mother. Evidence was admitted showing the circumstances under which the money was paid, and the court say: “The testimony of Webster is to the effect that he made the payment at the *request of the mother, and it was in full satisfaction* of his (Layle’s) interest in her estate. It also appears that Webster at that time had charge of and control of the funds of the testatrix, and was attending to her business. This testimony of Webster is not contradicted by any witness. \* \* \* The only question presented for decision is whether the \$400 was an ademption of the devise to N. B. Layle in the will of his mother. It seems to us that the evidence sustains the contention of appellees as to this question.” See also *Low v. Low*, 77 Me., 37; *Norfleet et al., Exrs., v. Callicott et al.*, 90 Miss., 221, 43 So. Rep., 616; *Vreeland v. Vreeland et al.*, 65 N. J. Eq., 668, 56 Atl. Rep., 1089.

In those cases the taking of the receipt, or the contract, by the testator, whether it merely acknowledged the gift or purported to state a con-



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tract dependent upon it, was clear evidence of the intention of the testator himself that the amount stated in the paper to have been received should be deducted from the legacy. The very fact that the testator demanded and accepted such a paper would be conclusive evidence of such intention on his part.

It is remarked in *Needles, Exr., v. Needles et al.*, 7 Ohio St., 432, that where two children contract *with each other* in regard to their expectancy from their ancestor, they stand upon equal footing, and although such contract cannot operate by way of assignment or release, yet where a valuable consideration has been paid it may operate by way of estoppel or be enforced in equity.

The above remark by the court in the *Needles* case is referred to in *Rosenthal v. Mayhugh*, 33 Ohio St., 155, 168, which is cited by defendants in error here. In that case a husband had left his family and place of residence and went to parts unknown and was not heard of for a period of more than seven years. He left his family without other means of support than the house and lot where he resided. His wife joined with the children, in order to induce a sale of the real estate for their mutual benefit, in representing that he was dead, and thereby effected the sale of the real estate and joined them in a conveyance in fee with covenants of general warranty. It was held that although the husband was still living, and although such conveyance did not operate as a release of her inchoate dower, yet by reason of the facts found by the court she was barred by way of equitable es-

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toppel from treating her contract as a nullity and from asserting her right to have dower assigned upon the actual death of her husband. That case presented all the elements required for the application of the doctrine of equitable estoppel. The consideration money was paid by the purchaser relying on the representations of the widow and children.

In this case, as we have seen, Mrs. Zinn did not give the \$2,000 to Mrs. Hoffman on account of any representations that were made by Mrs. Ellard, or because of anything that was stated by her in the receipt. The case lacks the essential elements which must be present before the application of the doctrine of estoppel can be insisted upon.

The judgment of the court of appeals will be reversed and the cause remanded with instructions to render judgment in favor of the plaintiff in error as prayed.

*Judgment reversed.*

NICHOLS, C. J., DONAHUE, WANAMAKER and MATTHIAS, JJ., concur.

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THE VILLAGE OF ELMWOOD PLACE *v.* SCHANZLE,  
A TAXPAYER.

*Municipal ordinances—Publication in one newspaper sufficient, when  
—Section 4227 et seq., General Code.*

In a municipality in which there is only one newspaper published and of general circulation, the publication in that paper of ordinances of a general nature, in the manner and for the period required by Section 4227 *et seq.*, General Code, is a compliance with the requirements of those sections.

(No. 14836—Decided March 9, 1915.)

CERTIFIED by the Court of Appeals of Hamilton county.

The facts are stated in the opinion.

*Mr. Charles S. Bell and Messrs. Peck, Shaffer & Peck*, for plaintiff in error.

*Mr. Frederick E. Niederhelman*, for defendant in error.

JOHNSON, J. The defendant in error brought a proceeding in the common pleas of Hamilton county to enjoin the village of Elmwood Place from issuing \$10,000 of refunding bonds which are described in the petition. The injunction was sought on the ground that the ordinance authorizing the issuance of the bonds had been published in but one newspaper.

It is averred in the petition that while the newspaper in which the publication was made is the only newspaper of which the whole or any part is

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printed in the village, and the only one which is first put into circulation in the village, or first issued in the village to be delivered or sent by mail, or otherwise, to its subscribers, or first offered for public sale within the village, yet there are more than two newspapers of opposite politics printed and first put into circulation therein which are published outside of the village.

A demurrer to the petition was overruled and final judgment entered by the court of common pleas. The court of appeals reversed this judgment and included in its entry an order that the cause be certified to this court for review and final determination, because the judgment upon which it had agreed was contrary to the judgment pronounced upon the same question by the court of appeals of the fifth appellate district.

The question presented is, What method, if any, is provided by existing law for the publication of ordinances of a general nature of a village in which there is printed only one newspaper, but in which two or more papers of opposite politics, published outside of the village, are generally circulated?

The statutory requirements touching the subject are included in Section 4227 *et seq.*, General Code. Pertinent parts are as follows: In Section 4227 "Ordinances of a general nature, or providing for improvements shall be published as hereinafter provided before going into operation," and Section 4228, "Ordinances and resolutions requiring publication shall be published in two newspapers of opposite politics, published and of general circulation

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in such municipality, if such there be." Section 4229 provides the number of times ordinances, resolutions, etc., "shall be published in two newspapers of opposite politics of general circulation therein, if there are such in the municipality," and Section 4232 provides that "in municipal corporations in which no newspaper is published, it shall be sufficient publication of ordinances \* \* \* to post up copies thereof at not less than five of the most public places in the corporation, to be determined by the council, for a period of not less than fifteen days prior to the taking effect thereof."

It will be observed that the existing statutes contain no express provision on the subject with reference to a municipality in which but one newspaper is published. This situation developed in the codification adopted in 1910. Prior to the codification what is now Section 4227 was contained in Section 1695, Revised Statutes. In the latter section it is provided "Ordinances of a general nature, or providing for improvements shall be published in some newspaper of general circulation in the corporation." In the codification the words "some newspaper" are omitted and the words "shall be published as hereinafter provided" are substituted.

It is contended substantially by the plaintiff in error that it is unreasonable to presume that the legislature intended to require publication of ordinances in villages in which two papers are published, and in villages in which no paper is published, but intended not to require publication in villages in which only one paper is published. It

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is therefore insisted that the codified statute should receive the same construction as that necessarily given to the original.

It is well settled that where the general statutes of the state are revised and consolidated there is a strong presumption that the same construction which the statute had had before revision should be applied to the enactment in the revised form, although the language may have been changed. In such case a court is only warranted in holding the construction to be changed when the intent of the legislature to make such change is clear and manifest. *State, ex rel., v. Commissioners of Shelby County*, 36 Ohio St., 326; *German-American Ins. Co. v. McBee et al.*, 85 Ohio St., 161, 173.

It is equally well settled that where the words of a statute are plain, explicit and unequivocal and express clearly and distinctly the sense of the law-making body, there is no occasion to resort to other means of interpretation. In such a situation the question is not, what did the general assembly intend to enact, but what is the meaning of that which it did enact? *D. T.-Woodbury & Co. v. Berry*, 18 Ohio St., 456; *Slingluff et al. v. Weaver et al.*, 66 Ohio St., 621; *Hough v. The Dayton Mfg. Co. et al.*, 66 Ohio St., 427.

Can it be said that it is clear and manifest that in the adoption of the General Code the general assembly intended to so change the statute then in force as to leave no provision for the publication of ordinances in a village in which only one newspaper is printed? Or can it be said that the words in the

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codified section are so free from ambiguity and doubt and express so clearly and distinctly the meaning of what the general assembly did enact that there is no occasion to resort to other means of interpretation? We think not. As already remarked, Section 1695, Revised Statutes, directed that the ordinance should be published in some newspaper of general circulation in the corporation. The act of October 22, 1902 (96 O. L., 60), Section 124, provided that Section 1695 should remain in full force and in addition thereto that such ordinances "shall be published in two newspapers of opposite politics, published and of general circulation in such municipality, if such there be." The same section also provided that except as otherwise provided in the act the ordinances required to be published should be published in two newspapers of opposite politics of general circulation therein, if there be such *in the municipality*.

The history of legislation on the subject involved in this controversy is such as to clearly indicate that the settled policy of the state is to require that ordinances of a general nature shall be published. Publication is the object to be attained, the essential requirement. As part of the plan to attain the purpose, the publication is required to be made in two newspapers of opposite politics published in the municipality "*if such there be*." It is to be presumed that the legislature contemplated that if there were such papers of opposite politics the information contained in the publication would be

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fairly distributed among the people of the community.

It is provided by Section 4229 that except as otherwise provided in this title, ordinances, resolutions, etc., "shall be published in two newspapers of opposite politics of general circulation therein, if there are such *in the municipality*," for the periods stated. There is in this provision no express requirement that such newspapers shall be published within the municipality. When considered, however, *in pari materia* with Section 4228, and in view of the fact that before the codification these two sections were included in the same section of the Revised Statutes, it would seem to be clear that the newspapers referred to in Section 4229 are the same as those referred to in Section 4228, viz., newspapers published within the municipality. Moreover, Section 6255, General Code, seems to require this construction. That section provides that for sufficient publication of a notice or advertisement required by law to be published for a definite period, at least one side of the newspaper in which such publication is made shall be printed in the county or municipal corporation in which such notice or advertisement is required to be published. This view is confirmed by the fact that by Section 4232 it is provided that in municipal corporations in which *no* newspaper is published, it shall be sufficient publication to post up copies.

It is contended by the defendant in error that under the present law there is but one way in which to publish ordinances in a municipality where there



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is but one newspaper published and of general circulation, and that is that the ordinance shall be posted as required by Section 4232, General Code. We cannot assent to this contention. The language in that section is: "In municipal corporations in which *no* newspaper is published, it shall be sufficient to post up copies."

From the face of the petition in this case it appears that there *is* a newspaper published in the village. Therefore, the condition which the statute provides must exist before "it shall be sufficient to post up copies" does not exist in this case. The natural inference from that plain provision would be that in a village in which a newspaper *is* published the publication would be required to be made in that paper if it was the only one.

Considering all the sections referred to together, in the light of the settled policy of the state, as indicated by the history of legislation on this subject, we are convinced that the general assembly did not intend by the codification to provide that in a village in which only one newspaper is published and of general circulation no publication of its ordinances would be required and did not do so; and we are constrained to hold that, in view of the absence of clear and unambiguous language to the contrary, the sections of the General Code referred to should receive the same construction required to be given to the sections of the Revised Statutes, from which the former were taken, and that the publication shown by the petition to have been made in the

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paper which was the only newspaper published and of general circulation in the village was sufficient.

The court of appeals correctly held that the demurrer to the petition should have been sustained by the court of common pleas and judgment entered for the defendant.

The judgment of the court of appeals will be affirmed.

*Judgment affirmed.*

NICHOLS, C. J., WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

ANGELOFF *v.* THE STATE OF OHIO.

*Criminal law—Rape—Variance between indictment and proof—  
Different transactions—Election by state—Date of offense—  
Evidence of act—Intercourse with others—Venereal disease—  
Physical examination of accused.*

(No. 14497—Decided November 17, 1914.)

ERROR to the Court of Appeals of Lucas county.

*Mr. L. H. Wilkinson*, for plaintiff in error.

*Mr. Charles M. Milroy*, prosecuting attorney,  
and *Mr. A. F. Connolly*, assistant prosecuting attorney,  
for defendant in error.

BY THE COURT. The fact that the witnesses offered by the state in a criminal prosecution differ as to the date of the commission of the offense charged in the indictment, does not constitute a

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variance between the allegations of the indictment and the proofs, but if it appears from the whole evidence that the witnesses for the state are testifying to different transactions, the state, at the close of its evidence, may be required to elect as to which transaction it will rely upon for conviction.

Where in the trial of an accused upon an indictment charging rape, as of the date of October 9, 1912, the prosecuting witness, a girl about ten years of age, testified, in May of the following year, that she thought the act was committed in August of the preceding year, but could not say what time in August it was committed, and other facts and circumstances were offered in evidence by the state tending to show that the act was probably committed at a later date, a verdict of guilty is sustained by the evidence, whether the jury believes the prosecuting witness was correct or mistaken in her testimony as to the date of the offense, provided, however, it clearly appears from the evidence that it is one and the same act charged in the indictment to have been committed on or about the 9th day of October.

In a prosecution for rape, where the state has given evidence tending to prove that the prosecuting witness had contracted a venereal disease from the defendant by reason of his alleged forcible sexual intercourse with her, evidence that she had sexual intercourse with others than the defendant about the time of the alleged rape is admissible to show that the prosecuting witness might have contracted the disease from some person other than the defendant, but evidence that she tried to have

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sexual intercourse with other men or boys during that period is inadmissible for any purpose.

Where a defendant while confined in jail submits without objection to a physical examination of his person, with knowledge that such examination is for the purpose of proving or disproving his guilt of the crime charged, evidence of the result of such examination may be admitted in evidence upon the trial. (*Lindsey v. The State*, 4 C. C., N. S., 409; affirmed, 69 Ohio St., 215.)

*Judgment affirmed.*

NICHOLS, C. J., SHAUCK, JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.



# MEMORANDA

OF

CASES DECIDED AND REPORTED WITHOUT  
OPINION, DURING THE PERIOD EM-  
BRACED IN THIS VOLUME.

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No. 14738. THE HOCKING VALLEY RAILWAY  
Co. *v.* THE PUBLIC UTILITIES COMMISSION OF  
OHIO ET AL. Decided September 15, 1914. ERROR  
to the Public Utilities Commission. *Messrs. Wil-  
son & Rector*, for plaintiff in error. *Mr. Timothy  
S. Hogan*, attorney general; *Mr. Joseph McGhee*;  
*Mr. Clarence D. Laylin*; *Mr. E. E. Eubanks* and  
*Mr. A. E. Jacobs*, for defendants in error. Ap-  
plication for stay of execution. Application denied.

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No. 13781. NIKLAS *v.* THE REUHL MOULDING  
AND MANUFACTURING Co. ET AL. Decided Sep-  
tember 29, 1914. ERROR to Circuit Court of Ham-  
ilton county. *Messrs. Healy, Ferris & McAvoy*;  
*Mr. Frank J. Dorger* and *Mr. Denis F. Cash*, for  
plaintiff in error. *Messrs. Cramer & Headley*, for  
defendants in error. Judgment affirmed. NICHOLS,  
C. J., JOHNSON, NEWMAN and WILKIN, JJ., con-  
cur. WANAMAKER, J., dissents.

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No. 13819. SELLEW ET AL. *v.* THE VINE STREET  
CONGREGATIONAL CHURCH. Decided September  
29, 1914. ERROR to Circuit Court of Hamilton

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county. *Messrs. Fulton & Woost; Mr. George Leonard and Mr. Charles A. Groom*, for plaintiffs in error. *Mr. Wallace Burch; Mr. Simeon M. Johnson; Mr. Charles B. Wilby; Mr. Edward F. Alexander and Mr. Charles W. Baker*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER and WILKIN, JJ., concur.

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No. 13894. THE BOARD OF EDUCATION OF THE PHILLIPSBURG VILLAGE SCHOOL DISTRICT *v.* KOCH. Decided September 29, 1914. ERROR to Circuit Court of Montgomery county. *Mr. R. C. Patterson*, prosecuting attorney; *Mr. C. R. Gilmore*, assistant prosecuting attorney; *Messrs. McKemy & Cline and Mr. Carl W. Lenz*, for plaintiff in error. *Mr. Charles H. Kumler*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 14184. THE TOLEDO & INDIANA RAILROAD CO. *v.* TAYLOR ET AL. Decided September 29, 1914. ERROR to Court of Appeals of Lucas county. *Messrs. King, Tracy, Chapman & Welles*, for plaintiff in error. *Messrs. Smith & Beckwith and Messrs. King, Tracy, Chapman & Welles*, for defendants in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

## Without Opinion.

No. 14401. IN RE LIQUIDATION OF THE METROPOLITAN BANK & TRUST Co. Decided September 29, 1914. ERROR to Court of Appeals of Hamilton county. *Mr. Timothy S. Hogan*, attorney general; *Mr. Robert Black* and *Mr. Frank Davis, Jr.*, for plaintiff in error. *Mr. Ferdinand Jelke, Jr.*; *Mr. James R. Clark* and *Mr. Landon L. Forschheimer*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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No. 13907. BAER *v.* REES. Decided October 7, 1914. ERROR to Circuit Court of Franklin county. *Messrs. Wilson & Rector*, for plaintiff in error. *Mr. Thos. M. Sherman*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur. NICHOLS, C. J., not participating.

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No. 13913. THE TOLEDO & OHIO CENTRAL RAILWAY Co. *v.* ALFORD. Decided October 7, 1914. ERROR to Circuit Court of Wyandot county. *Messrs. Finley & Gallinger* and *Messrs. Doyle & Lewis*, for plaintiff in error. *Messrs. Carter, Carter & Carter*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13918. AMERICAN ASSURANCE Co. *v.* EARLY. Decided October 7, 1914. ERROR to Cir-



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cuit Court of Cuyahoga county. *Messrs. Stearns, Chamberlain & Royon*, for plaintiff in error. *Messrs. Wing, Myler & Turney*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13914. RUSSELL, RECEIVER, *v.* HATTERY ET AL. Decided October 13, 1914. Error to Circuit Court of Stark county. *Mr. D. F. Reinoehl*, for plaintiff in error. *Mr. R. W. McCaughey* and *Messrs. Webber & Turner*, for defendants in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13922. OHIO VALLEY ELECTRIC RY. CO. *v.* BUEDEL. Decided October 13, 1914. Error to Circuit Court of Lawrence county. *Messrs. Johnson & Jones*, for plaintiff in error. *Mr. Osbert E. Irish* and *Messrs. Riley & Roberts*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13932. PETER *v.* PARKINSON, TREAS. Decided October 13, 1914. Error to Circuit Court of Holmes county. *Mr. W. S. Hanna* and *Mr. W. F. Garver*, for plaintiff in error. *Mr. C. J. Fisher*; *Mr. David T. Simpson* and *Mr. W. Stilwell*, for defendant in error. Judgment affirmed. NICHOLS,

Without Opinion.

C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER,  
NEWMAN and WILKIN, JJ., concur.

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No. 13949. THE COLUMBUS GAS AND FUEL Co.  
*v.* THE KNOX COUNTY OIL AND GAS Co. Decided  
October 13, 1914. ERROR to Circuit Court of Knox  
county. *Mr. Frederick N. Sinks* and *Messrs. H. H.  
& R. M. Greer*, for plaintiff in error. *Mr. F. O.  
Levering*, for defendant in error. Judgment af-  
firmed. NICHOLS, C. J., SHAUCK, JOHNSON,  
DONAHUE, WANAMAKER, NEWMAN and WILKIN,  
JJ., concur.

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No. 14191. BUSH *v.* COLE ET AL. Decided  
October 13, 1914. ERROR to Court of Appeals of  
Ashtabula county. *Mr. Walter C. Ong* and *Mr.  
Charles L. Lawyer*, for plaintiff in error. *Mr. H.  
E. Starkey* and *Messrs. Munsell & Hall*, for de-  
fendants in error. Judgment affirmed. SHAUCK,  
JOHNSON, WANAMAKER, NEWMAN and WILKIN,  
JJ., concur.

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No. 13933. BITTNER *v.* THE TITLE, GUARANTEE  
& SURETY Co. Decided October 20, 1914. ERROR  
to Circuit Court of Erie county. *Mr. H. L. Peeke*,  
for plaintiff in error. *Mr. John Ray* and *Mr. Robt.  
M. Morgan*, for defendant in error. Judgment of  
the circuit court reversed and that of the common  
pleas affirmed.

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Journal entry: It appearing from the record in this cause, that the plaintiff in error, C. C. Bittner, was guilty of no fraud or concealment in procuring the bond sued upon, and that the same was not obtained by him in consideration of compounding a felony, it is ordered and adjudged by this court that the judgment of the circuit court be, and the same hereby is, reversed and the judgment of the common pleas court affirmed. — REPORTER.

NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13946. WHEELING TRACTION Co. *v.* SHEPHERD, ADMX. Decided October 20, 1914. ERROR to Circuit Court of Belmont county. *Mr. Gordon D. Kinder and Messrs. Kennon & Kennon*, for plaintiff in error. *Mr. Hunter S. Armstrong and Mr. Fred Spriggs*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13953. THE YOUNGSTOWN & SHARON STREET RAILWAY Co. *v.* KRIMMEL. Decided October 20, 1914. ERROR to Circuit Court of Mahoning county. *Messrs. Arrel, Wilson, Harrington & DeFord*, for plaintiff in error. *Mr. Samuel M. Thompson; Mr. Thomas McNamara, Jr., and Mr. Charles Koonce, Jr.*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

Without Opinion.

No. 13957. SEARLES ET AL. *v.* COWDRICK. Decided October 20, 1914. ERROR to Circuit Court of Lucas county. *Messrs. Ray & Cordill*, for plaintiffs in error. *Messrs. Marshall & Fraser*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13958. SEARLES ET AL. *v.* COWDRICK. Decided October 20, 1914. ERROR to Circuit Court of Lucas county. *Messrs. Ray & Cordill*, for plaintiffs in error. *Messrs. Marshall & Fraser*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13959. RIGBY *v.* THE W. H. PALMER CO. Decided October 20, 1914. ERROR to Circuit Court of Mahoning county. *Messrs. Hine, Kennedy & Manchester*, for plaintiff in error. *Mr. Samuel M. Thompson* and *Mr. Charles Koonce, Jr.*, for defendant in error. Judgment of the circuit court reversed and that of the common pleas affirmed.

Journal entry: It appearing from the record that the written acceptance sued upon is not an unconditional acceptance but is subject to the conditions written in the order itself, and that the written order was not an unconditional order for the payment of money within the meaning of Section 8231, General Code, it is ordered and adjudged

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by this court that the judgment of the circuit court of Mahoning county is hereby reversed, and the judgment of the common pleas affirmed. — REPORTER.

NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13962. BROWN ET AL. *v.* GANTZ. Decided October 20, 1914. ERROR to Circuit Court of Miami county. *Messrs. Kerr & Kerr*, for plaintiffs in error. *Mr. Losh O. Harbaugh*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13956. KIME *v.* KIME. Decided October 27, 1914. ERROR to Circuit Court of Summit county. *Messrs. Holloway & Chamberlin*, for plaintiff in error. *Mr. G. M. Anderson*, for defendant in error. Judgment affirmed. SHAUCK, JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur. WANAMAKER, J., not participating.

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No. 13960. THE OHIO CULVERT PIPE CO. *v.* AGNEW ET AL., COUNTY COMMISSIONERS. Decided October 27, 1914. ERROR to Circuit Court of Mahoning county. *Mr. Willis Bacon* and *Mr. M. C. McNab*, for plaintiff in error. *Mr. R. A. Beard* and *Mr. A. M. Henderson*, prosecuting attorneys,

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for defendants in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13966. ILGENFRITZ *v.* MILLHAM. Decided October 27, 1914. ERROR to Circuit Court of Mahoning county. *Messrs. W. S. Anderson & Son* and *Mr. U. C. DeFord*, for plaintiff in error. *Mr. Ensign N. Brown* and *Messrs. Hine, Kennedy & Manchester*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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No. 13970. RATHBUN *v.* UNSER. Decided October 27, 1914. ERROR to Circuit Court of Erie county. *Messrs. King & Ramsey*, for plaintiff in error. *Messrs. Guerin & Ritter*, for defendant in error. Judgment affirmed on grounds stated in journal entry.

It is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same is, hereby affirmed.

This court finds that by reason of the stipulation of the parties made in the circuit court as to the evidence offered and introduced by the parties in the court below, the judgment of the circuit court as to costs in said case was correct.

NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13971. *FRENCH v. WINSLOW*. Decided October 27, 1914. ERROR to Circuit Court of Lucas county. *Messrs. Smith & Baker*, for plaintiff in error. *Mr. Richard W. Kirkley* and *Mr. Frank H. Geer*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13987. *IN RE ESTATE OF JENNINGS: GRINDLE v. THE AMERICAN MISSIONARY ASSOCIATION ET AL.* Decided October 27, 1914. ERROR to Circuit Court of Ashland county. *Messrs. Mykrantz & Patterson*, for plaintiff in error. *Messrs. Ford, Snyder & Tilden*, for defendants in error. Judgment of the circuit court reversed and that of the common pleas affirmed.

Journal entry: It appearing from the record that the plaintiff in error offered some evidence in support of the legal presumption that these notes were given for a valuable consideration, to-wit: "for services I rendered to him, taking care of him through a good many sicknesses" (page 32, printed record), the judgment of the common pleas court is not, therefore, contrary to law. It is, therefore, ordered and adjudged by this court that the judgment of the circuit court be, and the same hereby is, reversed. And this court coming now to render the judgment that the circuit court should have rendered, it is further ordered and adjudged that the judgment of the common pleas court in this

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action be, and the same hereby is, affirmed. —  
REPORTER.

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13925. SNYDER *v.* THE HURDLEY PIERCE ANDERSON Co. Decided November 10, 1914. ERROR to Circuit Court of Summit county. *Messrs. Boylan & Brouse*, for plaintiff in error. *Messrs. Wilcox, Burch & Adams*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur. WANAMAKER, J., not participating.

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No. 13974. HOLUB *v.* THE KIRK COMPANY. Decided November 10, 1914. ERROR to Circuit Court of Summit county. *Messrs. Holloway & Chamberlin*, for plaintiff in error. *Messrs. Slabaugh, Seiberling & Huber*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur. WANAMAKER, J., not participating.

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No. 13976. FERRIS *v.* EDMONDSON ET AL., COMMISSIONERS. Decided November 10, 1914. ERROR to Circuit Court of Hamilton county. *Mr. Charles B. Wilby*, for plaintiff in error. *Mr. Thomas L. Pogue*, prosecuting attorney; *Mr. John V. Campbell* and *Mr. Charles A. Groom*, assistant prosecuting attorneys, for defendants in error. Judgment



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affirmed. SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13981. LAWRENCE *v.* TAYLOR, ADMR., ET AL. Decided November 10, 1914. ERROR to Circuit Court of Cuyahoga county. *Messrs. Stearns, Chamberlain & Royon*, for plaintiff in error. *Mr. Walter C. Ong* and *Messrs. Squire, Sanders & Dempsey*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13991. MOSSER *v.* BEER, EXR. Decided November 10, 1914. ERROR to Circuit Court of Ashland county. *Messrs. Semple & Sherick* and *Messrs. Mykrantz & Patterson*, for plaintiff in error. *Mr. W. S. Kerr* and *Mr. R. M. Campbell*, for defendant in error. Judgment of the circuit court reversed and that of the common pleas affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13950. ARTER ET AL. *v.* ULERY ET AL. Decided November 17, 1914. ERROR to Circuit Court of Columbiana county. *Messrs. Metzger & Smith* and *Mr. E. H. Moore*, for plaintiffs in error. *Mr. John McVicker*; *Mr. C. S. Speaker* and *Mr. Judson Harmon*, for defendants in error. Judgment affirmed. SHAUCK, JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur.

Without Opinion.

No. 13989. TOLEDO, ST. LOUIS & WESTERN RAILROAD CO. *v.* SHOEMAKER. Decided November 17, 1914. ERROR to Circuit Court of Van Wert county. *Mr. Clarence Brown; Mr. Charles A. Schmettau; Mr. Raymond T. Garrison and Mr. Clark Good*, for plaintiff in error. *Messrs. Lindemann & Lindemann and Mr. H. L. Conn*, for defendant in error. Judgment affirmed. SHAUCK, JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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No. 13990. WEBER ET AL. *v.* LOCKWOOD ET AL. Decided November 17, 1914. ERROR to Circuit Court of Cuyahoga county. *Messrs. Wing, Myler & Turney and Mr. Don R. Sipe*, for plaintiffs in error. *Messrs. Carpenter, Young & Stocker*, for defendants in error. Judgment affirmed. SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13993. THE FIRST NATIONAL BANK OF DEFIANCE *v.* KEHNAST ET AL. Decided November 17, 1914. ERROR to Circuit Court of Defiance county. *Messrs. H. & R. Newbegin and Mr. Julian H. Tyler*, for plaintiff in error. *Messrs. Harris & Shaw and Messrs. Marshall & Fraser*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13999. THE SCIOTO VALLEY TRACTION CO. *v.* MAXWELL, ADMR. Decided November 17, 1914. ERROR to Circuit Court of Ross county. *Messrs. Daugherty, Todd & Rarey*, for plaintiff in error. *Mr. F. N. R. Redfern* and *Mr. Luther B. Yable*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 14004. COIL ET AL. *v.* BAUGHN ET AL., EXRS., ET AL. Decided November 17, 1914. ERROR to Circuit Court of Fayette county. *Mr. John Logan*, for plaintiffs in error. *Mr. Frank A. Chaffin* and *Mr. Humphrey Jones*, for defendants in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 14005. THE BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF CINCINNATI *v.* MUELLER, DOING BUSINESS AS STANDARD MARBLE WORKS. Decided November 17, 1914. ERROR to Circuit Court of Hamilton county. *Mr. Alfred Bettman* and *Mr. Walter M. Schoenle*, city solicitors; *Mr. Stanley W. Merrell* and *Mr. Constant Southworth*, assistant city solicitors, for plaintiff in error. *Messrs. Kramer & Bettman*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

Without Opinion.

No. 14013. NORRIS, EXR., ET AL. *v.* HULL. Decided November 17, 1914. ERROR to Circuit Court of Licking county. *Mr. Carl Norpell and Messrs. Jones & Jones*, for plaintiffs in error. *Mr. B. F. McDonald and Mr. Charles H. Kibler*, for defendant in error. Judgment affirmed. SHAUCK, JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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No. 14015. BOCKHOFF *v.* SCHENCK ET AL. Decided November 17, 1914. ERROR to Circuit Court of Montgomery county. *Messrs. Lentz, Sigler & Deulinger and Mr. D. B. VanPelt*, for plaintiff in error. *Mr. Lee Warren James*, for defendants in error. Judgment affirmed. SHAUCK, JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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No. 14475. CARIS, ADMR., *v.* BARRY ET AL. Decided November 17, 1914. ERROR to Court of Appeals of Morrow county. *Mr. C. H. Wood and Mr. J. C. Williamson*, for plaintiff in error. *Mr. J. W. Barry*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 14506. WHYSALL *v.* WEST. Decided November 17, 1914. ERROR to Court of Appeals of Marion county. *Messrs. Finley & Gallinger; Messrs. Scofield & Durfee and Messrs. McBride*

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*& Wolfe*, for plaintiff in error. *Messrs. Mouser & Moloney* and *Mr. Harry F. West*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 14559. LASZCZOSKI, BY ETC., *v.* THE BALTIMORE & OHIO RAILROAD CO. Decided November 17, 1914. ERROR to Court of Appeals of Richland county. *Messrs. Johnson & Johnson* and *Messrs. Brucker, Voegelé & Henkel*, for plaintiff in error. *Mr. F. A. Durban; Mr. R. J. King* and *Messrs. McBride & Wolfe*, for defendant in error. Judgment affirmed. SHAUCK, DONAHUE, NEWMAN and WILKIN, JJ., concur.

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No. 13995. AMERICAN ASSURANCE CO. *v.* DICKSON. Decided November 24, 1914. ERROR to Circuit Court of Hamilton county. *Messrs. Burch, Peters & Connolly* and *Messrs. Vorys, Sater, Seymour & Pease*, for plaintiff in error. *Mr. Millard Tyree*, for defendant in error. Judgment affirmed.

Journal entry: It appearing from the record that the defendant in error was necessarily and continuously totally disabled and prevented from performing any and every duty pertaining to any business or occupation, and strictly necessarily and continuously confined within the house except when ordered and directed by the legally qualified physician regularly and personally attending him

Without Opinion.

to go out into the open air as a part of the treatment prescribed by said physician for the cure of the defendant in error, and for no other purpose, it is, therefore, ordered and adjudged that the judgment of the circuit court be, and the same hereby is, affirmed. — REPORTER.

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER and WILKIN, JJ., concur.

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No. 14002. MOHN *v.* HEISEY & Co. Decided November 24, 1914. ERROR to Circuit Court of Ashland county. *Mr. C. H. Workman* and *Mr. J. F. Henderson*, for plaintiff in error. *Mr. S. M. Douglass*, for defendant in error. Judgment affirmed. SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 14008. STEELE *v.* GARN ET AL. Decided November 24, 1914. ERROR to Circuit Court of Wayne county. *Mr. A. D. Metz*, for plaintiff in error. *Mr. Joseph Gallagher* and *Mr. Joseph O. Fritz*, for defendants in error. Judgment of the circuit court reversed and judgment for plaintiff in error. Grounds stated in journal entry.

It is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same hereby is, reversed for the reason that said circuit court erred in overruling the motion of the plaintiff to dismiss the appeal on the grounds set forth in said motion. And coming now to render the

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judgment which the said circuit court should have rendered, it is hereby ordered and adjudged that the said appeal from the court of common pleas to the circuit court be, and the same is hereby, dismissed, and this cause is remanded to the court of common pleas with instructions to carry its former judgment into execution.

JOHNSON, DONAHUE, WANAMAKER and WILKIN, JJ., concur. NICHOLS, C. J., not participating.

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No. 14022. *COLE v. COLLINS ET AL.* Decided November 24, 1914. ERROR to Circuit Court of Portage county. *Messrs. Webb & Webb* and *Mr. I. T. Siddall*, for plaintiff in error. *Mr. A. S. Cole* and *Mr. W. J. Beckley*, for defendants in error. Judgment affirmed. *SHAUCK, JOHNSON, DONAHUE, WANAMAKER* and *NEWMAN, JJ.*, concur.

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No. 14024. *THE NORTHERN OHIO TRACTION & LIGHT CO. v. THE CITY OF AKRON.* Decided November 24, 1914. ERROR to Circuit Court of Summit county. *Messrs. Rowley, Mather & Eagleson*, for plaintiff in error. *Mr. Jonathan Taylor*, city solicitor, for defendant in error. Judgment affirmed.

Journal entry: It appearing from the record in this case that the question as to the amount of the fair and reasonable proportion of the cost of the construction of the improvement that the plaintiff in error should pay was properly and fairly sub-

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mitted to the jury in this case, regardless of the amount named in the ordinance passed by the city council of the City of Akron, Ohio, and that the jury by its verdict fixed and determined that amount independent of the amount fixed in the ordinance, it is hereby ordered and adjudged that the judgment of the circuit court be, and the same hereby is, affirmed. — REPORTER.

SHAUCK, JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur. WANAMAKER, J., not participating.

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No. 14031. HOPKINS *v.* MEYER ET AL. Decided November 24, 1914. ERROR to Circuit Court of Montgomery county. *Mr. Albert J. Dwyer*, for plaintiff in error. *Mr. D. B. VanPelt; Mr. R. R. Nevin* and *Mr. O. C. Sipe*, for defendants in error. Judgment affirmed. SHAUCK, JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 14032. PAPNER, ADMR., *v.* HARMON, RECEIVER. Decided November 24, 1914. ERROR to Circuit Court of Hamilton county. *Mr. Otto Pfleger* and *Mr. Marston Allen*, for plaintiff in error. *Messrs. Harmon, Colston, Goldsmith & Hoadly*, for defendant in error. Final judgment of the circuit court reversed; its judgment of reversal affirmed and cause remanded to court of common pleas for new trial.

Journal entry: It is ordered and adjudged by this court, that the judgment of the said circuit



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court be, and the same hereby is, reversed; for the reason that the said circuit court erred in entering final judgment in the cause. But this court finds that the said circuit court, having found that the verdict was not sustained by sufficient evidence, correctly reversed the judgment of the court of common pleas. Coming now to render the judgment which the circuit court should have rendered, it is hereby ordered and adjudged that the judgment of the court of common pleas be, and the same is hereby, reversed, and the cause remanded to the court of common pleas for further proceedings according to law. — REPORTER.

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 14033. SMITH ET AL., TOWNSHIP TRUSTEES, *v.* PALM, EXR., ET AL. Decided November 24, 1914. ERROR to Circuit Court of Huron county. *Mr. Don J. Young* and *Mr. J. R. McKnight*, for plaintiffs in error. *Mr. W. Severance*; *Mr. B. F. Long* and *Mr. Harlon L. Stewart*, for defendants in error. Judgment affirmed. SHAUCK, JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur.

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No. 14038. HALLETT ET AL. *v.* THE BELMONT HEIGHTS LAND Co. Decided November 24, 1914. ERROR to Circuit Court of Trumbull county. *Mr. M. C. McNab* and *Mr. T. I. Gillmer*, for plaintiffs in error. *Messrs. Hine, Kennedy & Manchester*,

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for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 14040. WASHINGTON FIRE INSURANCE CO. *v.* ADAMS. Decided November 24, 1914. ERROR to Circuit Court of Franklin county. *Messrs. Pummill & McKnight* and *Mr. O. H. Mosier*, for plaintiff in error. *Messrs. Webber, McCoy, Jones & Schoedinger*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 14047. CRAWFORD ET AL. *v.* STRATTON ET AL. Decided November 24, 1914. ERROR to Circuit Court of Jefferson county. *Mr. P. P. Lewis* and *Messrs. Mansfield & Merryman*, for plaintiffs in error. *Mr. E. E. Erskine*; *Mr. P. P. Lewis* and *Messrs. Mansfield & Merryman*, for defendants in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 14088. THE MAXWELL ROLF STONE CO. *v.* WHIGAM. Decided November 24, 1914. ERROR to Circuit Court of Cuyahoga county. *Mr. W. J. Patterson*, for plaintiff in error. *Mr. Walter C. Ong* and *Mr. Albert A. Thayer*, for defendant in

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error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 14523. THE PEOPLES SAVINGS BANK Co. *v.* STRINGER ET AL. Decided November 24, 1914. ERROR to Court of Appeals of Jefferson county. *Mr. Ralph B. Cohen*, for plaintiff in error. *Mr. R. G. Richards* and *Mr. F. R. Sedgwick*, for defendants in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13562. KLEIN *v.* GOLDSTEIN. Decided December 1, 1914. ERROR to Circuit Court of Hamilton county. *Messrs. Worthington & Strong*; *Mr. Frank Seinsheimer* and *Messrs. Kramer & Bettman*, for plaintiff in error. *Mr. Henry Bentley* and *Mr. Horace A. Reeve*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13707. CHAMPNEY ET AL. *v.* BRAUN. Decided December 1, 1914. ERROR to Circuit Court of Lorain county. *Mr. Q. A. Gilmore*; *Messrs. Squire, Sanders & Dempsey*; *Mr. H. G. Redington*; *Mr. H. M. Redington* and *Mr. H. J. Crawford*, for plaintiffs in error. *Mr. A. R. Webber* and *Mr. C. A. Metcalf*, for defendant in error. On rehearing. Judgment reversed. See journal entry.

## Without Opinion.

It is ordered and adjudged by this court that the judgment hereinbefore entered affirming the judgment of the circuit court of Lorain county be and the same is hereby opened up, set aside and held for naught.

And this court being fully advised in the premises, it is ordered and adjudged that the judgment of the circuit court affirming the judgment of the common pleas court against Harry R. Edwards, J. W. Roof, and Julia Schnuerer and Minni P. Schnuerer, as Executrices, and Charles L. Schnuerer as Executor of the Last Will and Testament of Louis Schnuerer, Deceased, be and the same hereby is reversed.

And this court coming now to render the judgment that should have been rendered in said cause by said court, the judgment of the common pleas court of Lorain county against these plaintiffs in error is reversed, set aside and held for naught for error of the common pleas court in overruling the motion of said plaintiffs in error to direct a verdict at the close of said plaintiffs evidence and at the conclusion of all the evidence, and this action against said defendants is hereby dismissed.

It is further ordered and adjudged that the judgment of the circuit court affirming the judgment of the common pleas court against the plaintiff in error Arthur R. Champney, be and the same hereby is reversed.

And the court coming now to render the judgment that the circuit court should have rendered in this behalf, it is ordered and adjudged that the

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judgment of the common pleas court against Arthur R. Champney and in favor of the defendant in error Lenora Braun, be and the same is hereby, reversed for error of the court in the limitation of the cross-examination of Lenora Braun, for the admission in evidence of her belief as to the value of the trade mark and formula of the Liquid Force in the absence of evidence that defendant Arthur R. Champney had represented to her that it was of a certain value, and that she relied upon such representations; and for error in admission of the receiver's account in evidence, and said cause as to Arthur R. Champney is remanded to the common pleas court of Lorain county for further proceedings and trial according to law.

NICHOLS, C. J., SHAUCK, DONAHUE and WILKIN, JJ., concur.

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No. 13928. HAVILAND, EXECUTRIX, *v.* FLEMING ET AL. Decided December 1, 1914. ERROR to Circuit Court of Franklin county. *Messrs. DeWitt & Hubbard* and *Mr. C. C. Williams*, for plaintiff in error. *Mr. M. E. Thrailkill*; *Mr. W. T. S. O'Harra*; *Mr. John J. Stoddart*; *Mr. John Stoddart, Jr.*; *Mr. William K. Williams* and *Mr. Jerry Dennis*, for defendants in error. Judgment affirmed. NICHOLS, C. J., DONAHUE, WANAMAKER and WILKIN, JJ., concur.

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No. 13943. KLEIN *v.* GOLDSTEIN. Decided December 1, 1914. ERROR to Circuit Court of Hamil-

## Without Opinion.

ton county. *Messrs. Worthington & Strong; Mr. Frank Seinsheimer and Messrs. Kramer & Bettman*, for plaintiff in error. *Mr. Henry Bentley and Mr. Horace A. Reeve*, for defendant in error. Judgment reversed. See journal entry.

It is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same is hereby, reversed.

And this court coming now to render the judgment that said circuit court should have rendered, it is hereby ordered and adjudged that the judgment of the superior court be, and the same hereby is, reversed for error of the trial court in refusing to give in charge to the jury defendant's written requests Nos. 7 and 8, and for error of the court in its charge to the jury in omitting to state that the negligence of the plaintiff, if the jury should find her guilty of negligence contributing to her own injury, would require the jury to return a verdict in favor of the defendant.

NICHOLS, C. J., SHAUCK, DONAHUE and WILKIN, JJ., concur.

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No. 14034. PADGETT ET AL. *v.* GREER ET AL., ADMRS. Decided December 1, 1914. ERROR to Circuit Court of Knox county. *Messrs. Pugh & Pugh*, for plaintiffs in error. *Mr. F. V. Owen; Messrs. Waight & Moore and Messrs. Greer & Greer*, for defendants in error. Judgment affirmed. SHAUCK, JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur. WILKIN, J., not participating.

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No. 14062. WIENER ET AL. *v.* GROSS. Decided December 1, 1914. ERROR to Court of Appeals of Cuyahoga county. *Messrs. Allen, Waters, Young & Andress* and *Messrs. Kline, Clevenger, Buss & Holliday*, for plaintiffs in error. *Messrs. White, Johnson, Cannon & Neff*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur. WANAMAKER, J., not participating.

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No. 14063. ILLINOIS SURETY CO. *v.* THE CINCINNATI AND SUBURBAN BELL TELEPHONE CO. Decided December 1, 1914. ERROR to Court of Appeals of Hamilton county. *Mr. David H. Scott* and *Messrs. Hopkins, Peffers & Hopkins*, for plaintiff in error. *Messrs. Peck, Shaffer & Peck*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur. WILKIN, J., not participating.

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No. 14068. BOLING *v.* BOLING. Decided December 1, 1914. ERROR to Circuit Court of Hamilton county. *Messrs. Gusweiler & Klein*, for plaintiff in error. *Mr. Joseph W. Conroy*, for defendant in error. Judgment reversed. See journal entry.

It is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same hereby is, reversed; [this court being of the opinion that the insolvency court having granted

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a decree of divorce on the petition of plaintiff in error and having overruled the motion of defendant in error to set aside said decree, neither the insolvency court nor the circuit court had jurisdiction to entertain an application thereafter filed in that case by defendant in error for alimony.

It is therefore ordered that the motion of defendant in error for alimony be dismissed.

NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur. WILKIN, J., not participating.

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No. 14079. ADDISON *v.* HAMPTON. Decided December 1, 1914. ERROR to Circuit Court of Franklin county. *Mr. Thomas H. Clark; Mr. Arlington C. Harvey and Mr. Louis G. Addison*, for plaintiff in error. *Messrs. Sheets & West*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 14081. THE FOURTH NATIONAL BANK OF CADIZ, OHIO, *v.* WARNICK ET AL. Decided December 1, 1914. ERROR to Circuit Court of Harrison county. *Mr. Albert O. Barnes and Mr. B. W. Rowland*, for plaintiff in error. *Mr. W. W. Cowan; Messrs. Hollingsworth & Moore; Mr. R. H. Minter; Mr. A. O. Barnes; Mr. E. S. McNamee; Mr. Frank B. Grove and Mr. C. W. Pet-tay*, for defendants in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.



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No. 14092. **PIERSON ET AL., ETC., v. FOURMAN ET AL.** Decided December 1, 1914. ERROR to Circuit Court of Darke county. *Mr. O. R. Krickenberg*, for plaintiffs in error. *Mr. Geo. W. Mannix, Jr.; Mr. D. W. Bowman* and *Messrs. McMahon & McMahon*, for defendants in error. Judgment affirmed. **NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur. WILKIN, J., not participating.**

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No. 14101. **STOREY v. STOREY.** Decided December 1, 1914. ERROR to Circuit Court of Lucas county. *Messrs. Calkins & Storey*, for plaintiff in error. *Messrs. Smith, Beckwith & Ohlinger*, for defendant in error. Judgment affirmed. **SHAUCK, JOHNSON, WANAMAKER and NEWMAN, JJ., concur. NICHOLS, C. J., dissents.**

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No. 14106. **FEDERAL UNION SURETY Co. v. THE STATE OF OHIO.** Decided December 1, 1914. ERROR to Circuit Court of Franklin county. *Messrs. Bennett & Westfall* and *Mr. William T. Spear*, for plaintiff in error. *Mr. Timothy S. Hogan*, attorney general; *Mr. Frank Davis, Jr.,* and *Mr. Chas. C. Marshall*, for defendant in error. Judgment affirmed. **NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur. SHAUCK, J., dissents.**

REPORTER'S NOTE. On July 2, 1915, the following entry was made in the foregoing case:

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This day this cause came on to be heard upon the application and motion of the plaintiff in error, Federal Union Surety Company, to modify the judgment heretofore rendered in this court affirming the judgment of the circuit court of Franklin county, Ohio, theretofore rendered in this cause, and the same was heard upon the admitted facts and statements, and arguments of counsel. And the court upon consideration thereof doth find that the bond executed by the plaintiff in error upon which this action was based, provided that in case of default thereof the State of Ohio should be entitled to recover thereon the amount of the principal sum, together with interest at the rate of two and one-half per centum per annum.

The court doth further find that said circuit court in rendering judgment in favor of the State of Ohio and against said Federal Union Surety Company in said cause, computed the interest on the principal amount of the default, as set forth in plaintiff's petition below, at the rate of six per centum per annum, from May 16th, 1908, to December 30th, 1912, the date of the rendition of said judgment by the circuit court of Franklin county, Ohio, to-wit, two years and 183 days, when the same should have been computed at the rate of two and one-half per centum per annum.

The court doth further find that in making the computation of interest in the method aforesaid, the circuit court in and for Franklin county, Ohio, gave judgment in favor of the State of Ohio against said Federal Union Surety Company, plaintiff in error herein, at said date, to-wit, December

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30th, 1912, in the amount of \$14,122.25, when according to law and the evidence the amount of said judgment at said date, so given in favor of said State of Ohio against said Federal Union Surety Company should have been for \$11,755.58.

The court doth further find that said amount of \$11,755.58 should bear interest at the rate of two and one-half per centum per annum to the 5th day of April, 1915, or two years, three months and five days, at the rate of two and one-half per centum per annum, and that the amount thereof, to-wit, \$12,420.91, should after said 5th day of April, 1915, until paid, bear interest at the rate of six per centum per annum.

It is therefore ordered and adjudged that the judgment of this court in this cause, heretofore rendered on the 1st day of December, A. D. 1914, affirming the judgment of the circuit court of Franklin county, Ohio, in all respects as rendered by that court, be, and the same hereby is modified in this respect, to-wit: That said defendant in error, the State of Ohio, may have and there hereby is awarded to it, judgment against said plaintiff in error, Federal Union Surety Company, as of date of December 30th, 1912, in the sum of \$11,755.58, together with interest thereon at the rate of two and one-half per centum per annum, from said 30th day of December, 1912, to the 4th day of April, 1915, with the amount thereof, to-wit, \$12,420.91, to bear interest at the rate of six per centum per annum until paid, and in all other respects, not inconsistent herewith, the judgment of said circuit court of Franklin county, Ohio, be affirmed.

Without Opinion.

No. 14492. *BEVAN v. THE BOARD OF FOREIGN MISSIONS OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA*. Decided December 1, 1914. ERROR to Court of Appeals of Delaware county. *Messrs. Marriott, Freshwater & Wickham* and *Messrs. Pugh & Pugh*, for plaintiff in error. *Messrs. Overturf, Hough & Jones* and *Messrs. Waight & Moore*, for defendant in error. Judgment affirmed on the ground that the reversal of the court of appeals involved a consideration of the weight of all the evidence.

Journal entry: It is ordered and adjudged by this court, that the judgment of the said court of appeals be, and the same hereby is, affirmed; for the reason that the record discloses that one of the grounds upon which the court of appeals reversed the judgment of the court of common pleas was that the verdict of the jury is clearly and manifestly against the weight of the evidence, and a reversal of the judgment of the court of appeals would involve the consideration by this court of the weight of all the evidence in the case. — REPORTER.

SHAUCK, JOHNSON, WANAMAKER and NEWMAN, JJ., concur. DONAHUE, J., not participating.

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No. 14099. *THE KERLIN BROTHERS CO. v. NORTON ET AL.* Decided December 8, 1914: ERROR to Court of Appeals of Hardin county. *Mr. Julian H. Tyler*; *Messrs. H. & R. Newbegin*; *Messrs. Dore & Dore* and *Messrs. Johnson & Johnson*, for plaintiff in error. *Messrs. Mykrantz & Patter-*

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son; *Mr. C. W. Faulkner; Messrs. Smick & Hoge; Mr. James Ray Stillings; Mr. George E. Crane; Mr. J. C. Dugan; Mr. A. M. Tidd; Messrs. Arnold & Game and Messrs. Williams, Williams, Taylor & Nash*, for defendants in error. Judgment affirmed. SHAUCK, JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur. NICHOLS, C. J., not participating.

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No. 14102. *ERRETT v. THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY CO.* Decided December 8, 1914. ERROR to Court of Appeals of Crawford county. *Mr. L. C. Feighner; Mr. W. C. Beer and Mr. Anson Wickham*, for plaintiff in error. *Messrs. Cummings, McBride & Wolfe and Mr. H. R. Schuler*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE and NEWMAN, JJ., concur.

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No. 14103. *WELDON v. THE COLUMBUS, DELAWARE & MARION RY. CO. ET AL.* Decided December 8, 1914. ERROR to Circuit Court of Franklin county. *Messrs. Kohn, Sloss, Bingham & Spindle and Messrs. Vorys, Sater, Seymour & Pease*, for plaintiff in error. *Messrs. Gottschall & Turner; Messrs. Williams, Williams, Taylor & Nash and Mr. T. J. Keating*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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No. 14109. LUDWIG ET AL. *v.* WALLACE ET AL. Decided December 8, 1914. ERROR to Circuit Court of Wood county. *Mr. Edward M. Fries*, for plaintiffs in error. *Mr. N. R. Harrington*, for defendants in error. Judgment of the circuit court reversed and that of the common pleas affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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No. 14112. THE STATE, EX REL. KATZ, *v.* ALLEN, AUDITOR, ET AL. Decided December 8, 1914. ERROR to Court of Appeals of Marion county. *Messrs. DeGolley & DeGolley* and *Mr. J. W. Jacoby*, for plaintiff in error. *Mr. Homer E. Johnson*, prosecuting attorney; *Mr. Charles L. Justice* and *Mr. John A. Clark*, for defendants in error. Judgment of the court of appeals reversed and that of the common pleas affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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No. 14551. METZGER *v.* ASHLEY ET AL. Decided December 8, 1914. ERROR to Court of Appeals of Lucas county. *Mr. Earle Peters* and *Mr. C. S. Northup*, for plaintiff in error. *Mr. Eugene Rheinfrank*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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No. 14571. ALBRINK ET AL., COMMISSIONERS, *v.* THE COLUMBUS, FINDLAY & NORTHERN RAILWAY Co. Decided December 8, 1914. ERROR to Court of Appeals of Henry county. *Mr. R. W. Cahill*, prosecuting attorney, for plaintiffs in error. *Mr. H. F. Burket*; *Mr. W. W. Campbell* and *Mr. M. R. Waite*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE and NEWMAN, JJ., concur.

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No. 14579. ROYER, ADMR., *v.* WITTENMIRE ET AL. Decided December 8, 1914. ERROR to Court of Appeals of Ashland county. *Mr. A. H. Stillwell*; *Mr. R. L. Adair* and *Mr. F. S. Monnett*, for plaintiff in error. *Messrs. McCray & McCray*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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No. 14595. THE UNITED TELEPHONE Co. *v.* THE LOGAN COUNTY FARMERS TELEPHONE Co. ET AL. Decided December 8, 1914. ERROR to Court of Appeals of Logan county. *Messrs. Howenstine & Huston*, for plaintiff in error. *Messrs. West & Chamberlin*, for defendants in error. Judgment affirmed. See journal entry.

It appearing that this cause was submitted to the court of appeals on the pleadings and the evidence including an agreed statement of facts and that no bill of exceptions was taken on the hear-

Without Opinion.

ing of said cause nor was the agreed statement of facts brought into the record in accordance with the rule announced in *Goyert v. Eicher*, 70 Ohio St., 30, and that the facts presumably established to the satisfaction of the court of appeals in support of its judgment are not in this court for review, it is ordered and adjudged that the judgment of the court of appeals be and the same is hereby affirmed.

NICHOLS, C. J., JOHNSON, DONAHUE and NEWMAN, JJ., concur.

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No. 13627. *MERKEL ET AL. v. REED ET AL.* Decided December 15, 1914. ERROR to Circuit Court of Wayne county. *Mr. Samuel B. Eason* and *Mr. L. D. Cornell*, for plaintiffs in error. *Mr. Hiram B. Swartz* and *Mr. H. R. Smith*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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No. 13967. *THE BALTIMORE & OHIO SOUTHWESTERN RD. CO. v. AUSTIN, ADMR.* Decided December 15, 1914. ERROR to Circuit Court of Clinton county. *Mr. Edward Barton*; *Mr. John P. Phillips* and *Messrs. Smith & Clevinger*, for plaintiff in error. *Mr. Eldon L. Hayes*; *Mr. Melville Hayes* and *Mr. J. C. Martin*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE and WANAMAKER, JJ., concur.



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No. 14094. *CHAPMAN v. TOWNSEND ET AL.* Decided December 15, 1914. ERROR to Court of Appeals of Cuyahoga county. *Messrs. M. B. & H. H. Johnson* and *Mr. Charles Higley*, for plaintiff in error. *Messrs. A. A. & A. H. Bemis; Mr. W. J. O'Neill; Mr. C. R. Megerth; Messrs. M. B. & H. H. Johnson; Mr. Charles Higley* and *Messrs. Smith, Taft & Arter*, for defendants in error. Judgment reversed.

Journal entry: It is ordered and adjudged by this court, that the judgment of the said court of appeals be, and the same hereby is, reversed: and this cause is remanded to the said court of appeals with instructions to enter judgment in favor of the plaintiff in error, Caroline S. Chapman and the cross-petitioners in error, the Citizens Savings & Trust Company, Nathan E. Chapman and the Guardian Savings & Trust Company, executor of the last will and testament of Harry E. Chapman, deceased, and for further proceedings according to law. — REPORTER.

SHAUCK, JOHNSON, DONAHUE and WANAMAKER, JJ., concur. NICHOLS, C. J., and NEWMAN, J., dissent.

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No. 14108. *THE A. G. BLAIR MINING Co. v. FRIEDL, ADMR.* Decided December 15, 1914. ERROR to Court of Appeals of Lucas county. *Mr. Julian H. Tyler; Messrs. Mulholland & Hartmann* and *Mr. Frank H. Geer*, for plaintiff in error. *Mr. G. M. Skiles; Mr. E. C. Chapman; Mr. H. J. Nord*

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and *Mr. C. M. Milroy*, for defendant in error. Judgment of the court of appeals reversed and that of the common pleas affirmed. NICHOLS, C. J., JOHNSON, DONAHUE and WANAMAKER, JJ., concur.

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No. 14118. NICKOSON *v.* THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RY. CO. Decided December 15, 1914. ERROR to Circuit Court of Hamilton county. *Mr. L. F. Ratterman* and *Mr. M. F. Roebeling*, for plaintiff in error. *Messrs. Harmon, Colston, Goldsmith & Hoadly*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE and NEWMAN, JJ., concur. WANAMAKER, J., dissents.

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No. 14119. STRAUS ET AL., PARTNERS, *v.* STERN ET AL. Decided December 15, 1914. ERROR to Court of Appeals of Lucas county. *Mr. S. C. Hubbell* and *Messrs. Doyle & Lewis*, for plaintiffs in error. *Messrs. Kohn, Northup & Morgan*, for defendants in error. Judgment reversed. Petition dismissed without prejudice.

Journal entry: It appearing from the record that the defendant in error Matilda Stern has not fully complied with the terms of her contract with plaintiffs in error, dated February 26, 1909, deposited with the deed and escrow memorandum with the Northern National Bank, and it further

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appearing that said plaintiffs in error have not waived performance on the part of defendant in error in any particular therein named, and have in nowise interfered with or prevented said defendant in error Matilda Stern from complying therewith, and have not refused nor has their grantee refused to permit an action to quiet title to these premises to be brought in the name of either of said parties, if the same should become necessary, and for these reasons the court finds that this action was prematurely brought in the common pleas court of Lucas county, and the court of appeals erred in affirming the judgment of that court.

It is, therefore, considered and adjudged by this court that the judgment of the court of appeals be, and the same hereby is, reversed.

And coming now to render the judgment that the court of appeals should have rendered, the judgment of the common pleas court in this action is hereby reversed, set aside and held for naught, and said action is dismissed without prejudice to a new action when defendant in error Matilda Stern shall have complied with the terms of said contract, or the same shall become impossible of performance by reason of the default, hindrance or refusal of the plaintiffs in error or their assignees or grantees to permit suit to be brought in the name of the real party in interest to quiet the title thereto. — REPORTER.

SHAUCK, JOHNSON, DONAHUE and NEWMAN, JJ., concur.

## Without Opinion.

No. 14122. KROZSER *v.* A. VERHOVAY BETEG-SEGELYZO EGYLET. Decided December 15, 1914. ERROR to Court of Appeals of Cuyahoga county. *Mr. Hugo E. Varga; Mr. Theo. L. Strimple and Mr. D. B. Stone*, for plaintiff in error. *Mr. M. B. Putney and Mr. D. M. Bader*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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No. 14135. WIBORG *v.* THE CINCINNATI HORSE & MULE EXCHANGE Co. Decided December 15, 1914. ERROR to Circuit Court of Hamilton county. *Mr. P. Lincoln Mitchell*, for plaintiff in error. *Mr. Edwards Ritchie and Mr. Ben B. Nelson*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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No. 14140. THE BAKER MOTOR VEHICLE Co. *v.* PRICE ET AL. Decided December 15, 1914. ERROR to Circuit Court of Cuyahoga county. *Messrs. M. B. & H. H. Johnson*, for plaintiff in error. *Messrs. Tolles, Hogsett, Ginn & Morley*, for defendants in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, WANAMAKER and NEWMAN, JJ., concur.

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No. 14142. BROGAN *v.* THE CINCINNATI TRACTION Co. Decided December 15, 1914. ERROR to Court of Appeals of Hamilton county. *Messrs.*

## Cases Reported

*Kramer & Bettman; Mr. John D. Ellis and Mr. Gilbert Bettman*, for plaintiff in error. *Mr. Miller Outcalt*, for defendant in error. Judgment of the court of appeals reversed and that of the superior court affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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No. 14145. THE UPSON-WALTON CO. *v.* THE UNITED STATES FIDELITY & GUARANTY CO. Decided December 15, 1914. ERROR to Court of Appeals of Cuyahoga county. *Messrs. White, Johnson, Cannon & Neff*, for plaintiff in error. *Messrs. Stearns, Chamberlain & Royon*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, WANAMAKER and NEWMAN, JJ., concur.

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No. 14146. MORRISON *v.* HARDING. Decided December 15, 1914. ERROR to Court of Appeals of Marion county. *Messrs. Carhart & Warner*, for plaintiff in error. *Messrs. Mouser & Moloney*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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No. 14148. TORRENCE, EXR., *v.* CLEGG. Decided December 15, 1914. ERROR to Circuit Court of Montgomery county. *Mr. Benj. F. McCann*, for plaintiff in error. *Mr. Roy G. Fitzgerald*, for

Without Opinion.

defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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No. 14154. DAVIDSON *v.* FARROW. Decided December 15, 1914. ERROR to Court of Appeals of Cuyahoga county. *Messrs. Goulder, Day, White & Garry* and *Mr. Luther Day*, for plaintiff in error. *Messrs. Holding, Masten, Duncan & Leckie*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE and WANAMAKER, JJ., concur.

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No. 14190. THE GEORGE WORTHINGTON CO. *v.* UNITED STATES FIDELITY & GUARANTY CO. Decided December 15, 1914. ERROR to Court of Appeals of Cuyahoga county. *Messrs. Thompson, Hine & Flory*, for plaintiff in error. *Messrs. Stearns, Chamberlain & Royon*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, WANAMAKER and NEWMAN, JJ., concur.

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No. 14597. RUDY *v.* SHANAHAN. Decided December 15, 1914. ERROR to Court of Appeals of Allen county. *Mr. W. P. Anderson*, for plaintiff in error. *Messrs. MacKenzie & Weadock*, for defendant in error. Judgment affirmed. NICHOLS, C. J., DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

## Cases Reported

No. 14631. CITY OF CINCINNATI ET AL. *v.* DICKERSON. Decided December 15, 1914. ERROR to Court of Appeals of Hamilton county. *Mr. Walter M. Schoenle*, city solicitor, and *Mr. Frank K. Bowman*, assistant city solicitor, for plaintiffs in error. *Mr. H. E. Engelhardt*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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No. 14641. EATON, DOING BUSINESS AS THE BUCYRUS IMPLEMENT CO., ET AL. *v.* OREWILER & ARMSTRONG. Decided December 15, 1914. ERROR to Court of Appeals of Crawford county. *Mr. J. Walter Wright* and *Mr. W. J. Schwenck*, for plaintiffs in error. *Mr. O. W. Kennedy* and *Messrs. Leuthold & McCarron*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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No. 14659. GREGG *v.* KEENER ET AL. Decided December 15, 1914. ERROR to Court of Appeals of Licking county. *Messrs. Kibler & Kibler*, for plaintiff in error. *Mr. A. A. Stasel*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

Without Opinion.

No. 14696. SNYDER ET AL. *v.* DEEDS ET AL. Decided December 15, 1914. ERROR to Court of Appeals of Montgomery county. *Messrs. Hoyt, Dustin, Kelley, McKeehan & Andrews; Mr. J. E. Bowman; Mr. Paul J. Bickel; Mr. Augustus N. Summers; Mr. George A. Beard; Mr. Chas. C. Hall*, prosecuting attorney; *Mr. Frank J. Doorley*, city solicitor; *Mr. G. T. Thomas*, city solicitor; *Mr. P. R. Taylor*, city solicitor; *Mr. J. Guy O'Donnell*, prosecuting attorney; *Mr. F. B. Long*, prosecuting attorney; *Mr. E. K. Campbell*, city solicitor; *Mr. A. J. Miller; Mr. Horace W. Stafford; Mr. Robert Black; Mr. F. B. McConnell; Mr. Dow Aiken and Mr. J. A. Kerr*, for plaintiffs in error. *Messrs. Brown & Frank; Mr. John A. McMahon and Messrs. Galvin & Galvin*, for defendants in error. Judgment reversed. Grounds stated in journal entry.

This court finds that the provisions of the statute, known as the Conservancy Act of Ohio, involved in this case, which confer jurisdiction, power and authority on the courts of common pleas of any county of this state to establish conservancy districts when the conditions stated in the act are found to exist, as well as the provisions of said act which provide for the organization and membership of such court in case of a district lying in more than one county, are valid and not repugnant to any provision of the constitution. And the court having considered Section 79 of said act which declares it to be an emergency law necessary for the immediate preservation of the public



## Cases Reported

health and safety finds that the reasons given in said section for such declaration are valid reasons authorizing such declaration within the provisions of Section 1d, Article II of the Constitution. The court further finds that the portion of the sixth section of said act which provides for appeal from an order refusing to establish such district to the court of appeals of said county, upon giving bond as provided therein, is void because repugnant to Section 6, Article IV, of the Constitution, and the court of appeals erred in overruling the motions of appellees to dismiss the appeal therein, and in retaining said cause for review of the judgment of the court of common pleas for errors apparent on the record and in reversing said judgment.

It is, therefore, ordered and adjudged that the judgment of said court of appeals be, and the same is hereby, reversed, set aside and held for naught, and coming now to render the judgment that the court of appeals should have rendered, it is ordered and adjudged that the motions to dismiss the appeal be, and the same hereby are, sustained.

NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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No. 14105. ATWELL ET AL. *v.* THE CITIZENS SAVINGS & TRUST CO., TRUSTEE, ET AL. Decided January 12, 1915. ERROR to Court of Appeals of Cuyahoga county. *Messrs. Tolles, Hogsett, Ginn & Morley*, for plaintiffs in error. *Messrs. Squire, Sanders & Dempsey* and *Mr. Robert F. Denison*

Without Opinion.

for defendants in error. Judgment affirmed. JOHNSON, DONAHUE, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14113. FOX *v.* JEWELL. Decided January 12, 1915. ERROR to Circuit Court of Hamilton county. *Messrs. Paxton, Warrington & Seasongood*, for plaintiff in error. *Messrs. Peck, Shaffer & Peck* and *Mr. Edwards Ritchie*, for defendant in error. Judgment affirmed. See journal entry.

The court finds that the trial court erred in giving the following in its charge to the jury: "You have the right to disregard any evidence that you choose and consider that only which appeals to your sense of justice and fairness," but the court further finds upon consideration of the entire charge and of the whole record that such error was not prejudicial to the rights of plaintiff in error and that substantial justice was done in the judgments of the courts below.

It is, therefore, ordered and adjudged by this court that the judgment of the said circuit court be and the same is hereby affirmed.

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, JONES and MATTHIAS, JJ., concur.

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No. 14156. THE NATIONAL BANK OF COMMERCE OF TOLEDO, OHIO, *v.* BURNOR. Decided January 12, 1915. ERROR to Court of Appeals of Lucas county. *Messrs. Smith & Beckwith*, for plaintiff in error. *Messrs. Smith & Baker*, for de-

## Cases Reported

pendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14167. SCHMIDT *v.* CITY OF CLEVELAND. Decided January 12, 1915. ERROR to Court of Appeals of Cuyahoga county. *Messrs. Clum & Marty*, for plaintiff in error. *Mr. E. K. Wilcox*, city solicitor, and *Mr. Jos. C. Hostettler*, assistant city solicitor, for defendant in error. Judgment affirmed on authority of *The Kinnear Manufacturing Co. et al. v. Beatty*, 65 Ohio St., 264. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14168. FIESER ET AL. *v.* THE OHIO MINING & MANUFACTURING Co. Decided January 12, 1915. ERROR to Court of Appeals of Franklin county. *Mr. Louis G. Addison*, for plaintiffs in error. *Messrs. Henderson, Livesay & Burr*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14549. STATE OF OHIO *v.* COX ET AL. Decided January 12, 1915. EXCEPTIONS to Common Pleas Court of Hamilton county. *Mr. Timothy S. Hogan*, attorney general; *Mr. Thomas L. Pogue*, prosecuting attorney; *Mr. Carl M. Jacobs*, as-

## Without Opinion.

sistant prosecuting attorney, and *Mr. Joseph McGhee*, for plaintiff in error. *Mr. James B. Swing; Mr. Miller Outcalt; Mr. W. C. Shepherd; Mr. Gilbert Bettman* and *Mr. Alfred C. Cassatt*, for defendants in error. Exceptions dismissed. Bill not having been filed within time required by statute. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur. JONES and MATTHIAS, JJ., not participating.

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No. 14126. THE BUCKEYE WINDOW GLASS CO. *v.* SOUDER. Decided January 19, 1915. ERROR to Court of Appeals of Franklin county. *Messrs. Sheets & West*, for plaintiff in error. *Messrs. Wilson & Rector* and *Messrs. Neal & Sapp*, for defendant in error. Judgment affirmed. DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur. NICHOLS, C. J., dissents.

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No. 14153. THE NATIONAL CASH REGISTER CO. *v.* MAGEE. Decided January 19, 1915. ERROR to Circuit Court of Montgomery county. *Mr. Lee Warren James* and *Messrs. Thomas & Bronson*, for plaintiff in error. *Messrs. Mattern & Brumbaugh*, for defendant in error. Judgment affirmed. See journal entry.

It is ordered and adjudged by this court, that the judgment of the said Circuit Court be, and the same is hereby, affirmed; on the grounds stated in the journal entry of the circuit court, to-wit: that the court of common pleas erred in giving to the

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jury before argument at the request of counsel for the defendant in error special request No. 3 which is set out in that entry.

NICHOLS, C. J., JOHNSON, WANAMAKER, JONES and MATTHIAS, JJ., concur.

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No. 14175. PISAK *v.* THE NEW YORK, CHICAGO & ST. LOUIS RD. Co. Decided January 19, 1915. ERROR to Court of Appeals of Cuyahoga county. *Mr. Herman J. Nord* and *Mr. C. W. Dille*, for plaintiff in error. *Mr. T. S. Dunlap* and *Mr. John H. Clarke*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14178. CRITES ET AL. *v.* THE PILLMORE-ANDEREGG Co. Decided January 19, 1915. ERROR to Court of Appeals of Franklin county. *Mr. A. O. Barnes* and *Mr. A. H. Johnson*, for plaintiffs in error. *Messrs. Musser, Kimber & Huffman*; *Mr. J. A. H. Meyers* and *Mr. G. B. Thompson*, for defendant in error. Judgment reversed. See journal entry.

It is ordered and adjudged by this court, that the judgment of the said court of appeals be, and the same hereby is, reversed; for the reason that, on the measure of damages the trial court erred in its general charge and in directing the jury not to consider the cost of installation and mainte-

## Without Opinion.

nance of the machines in controversy; the measure of damages having been fixed by the contract, to-wit: the loss sustained thereunder by the plaintiff below for its breach, less the diminution in the reasonable cost of installation and maintenance.

It is therefore considered by this court that the verdict be, and the same is, set aside and a new trial granted at the cost of the defendant in error.

WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14183. THE CINCINNATI TRACTION CO. *v.* RISKEY. Decided January 19, 1915. ERROR to Court of Appeals of Hamilton county. *Messrs. Paxton, Warrington & Seasongood* and *Mr. Robert S. Marx*, for plaintiff in error. *Messrs. Bode & Jung*, for defendant in error: Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14314. THE CINCINNATI TRACTION CO. *v.* GREVE. Decided January 19, 1915. ERROR to Court of Appeals of Hamilton county. *Messrs. Kittredge & Wilby* and *Mr. R. E. Simmonds, Jr.*, for plaintiff in error. *Mr. Harry H. Friedman; Mr. Jacob S. Hermann* and *Mr. Thomas L. Michie*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

## Cases Reported

No. 14593. *THE CITY OF CINCINNATI v. FILSER*. Decided January 19, 1915. ERROR to Court of Appeals of Hamilton county. *Mr. Walter M. Schoenle*, city solicitor; *Mr. Constant Southworth* and *Mr. Coleman Avery*, assistant city solicitors, for plaintiff in error. *Mr. Geoffrey Goldsmith* and *Mr. Guido Gores*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and MATTHIAS, JJ., concur.

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No. 14000. *THE SCIOTO VALLEY TRACTION CO. v. KADEL, ADMR.* Decided January 26, 1915. ERROR to Circuit Court of Ross county. *Messrs. Daugherty, Todd & Rarey*, for plaintiff in error. *Mr. Lyle S. Evans* and *Mr. James I. Boulger*, for defendant in error. Judgment affirmed. NICHOLS, C. J., DONAHUE and WANAMAKER, JJ., concur. JONES, J., not participating.

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No. 14052. *GREGG v. THE TOLEDO, BOWLING GREEN & SOUTHERN TRACTION CO.* Decided January 26, 1915. ERROR to Circuit Court of Hancock county. *Mr. Charles J. O'Connor* and *Messrs. Robeson & Yount*, for plaintiff in error. *Mr. E. V. Bope*, for defendant in error. Judgment affirmed. DONAHUE, NEWMAN, JONES and MATTHIAS, JJ., concur. WANAMAKER, J., dissents.

Without Opinion.

No. 14150. *THE VILLAGE OF FRANKLIN v. THE OHIO ELECTRIC RAILWAY Co.* Decided January 26, 1915. ERROR to Court of Appeals of Warren county. *Mr. Arthur Bryant*, for plaintiff in error. *Mr. W. C. Shepherd*, for defendant in error. Judgment of the court of appeals reversed and judgment for plaintiff in error.

Journal entry: It is ordered and adjudged by this court, that the judgment of the said court of appeals be, and the same hereby is, reversed; and the court finds from the facts conceded by the pleadings in the case that the plaintiff is entitled to the relief prayed for in its petition.

It is further ordered and adjudged that the cause be remanded to the court of appeals with instructions to enter judgment in accordance with the above finding. — REPORTER.

JOHNSON, DONAHUE, WANAMAKER, JONES and MATTHIAS, JJ., concur.

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No. 14192. *ARBUCKLE v. THE AMERICAN BELTING Co.* Decided January 26, 1915. ERROR to Court of Appeals of Mahoning county. *Mr. E. H. Moore*; *Mr. S. M. Strain* and *Mr. Chas. J. Jackson*, for plaintiff in error. *Messrs. Arrel, Wilson, Harrington & DeFord*, for defendant in error. Judgment of the court of appeals vacated. See journal entry.

It is ordered and adjudged by this court, that the judgment of the said court of appeals be, and the same hereby is, vacated because the court finds



## Cases Reported

that the court of appeals did not acquire jurisdiction of the said cause, there never having been any final order or judgment in the court of common pleas.

It is further ordered and adjudged that this cause be remanded to the court of common pleas with instructions to proceed according to law to assess the amount of damages in favor of the plaintiff against the defendant.

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14193. THE CINCINNATI, MILFORD & LOVELAND TRACTION Co. *v.* CINCINNATI & COLUMBUS TRACTION Co. ET AL. Decided January 26, 1915. ERROR to Court of Appeals of Hamilton county. *Mr. Thorne Baker* and *Mr. Charles W. Baker*, for plaintiff in error. *Mr. Gideon C. Wilson; Mr. C. B. Matthews; Mr. Harry T. Klein; Mr. Thorne Baker* and *Mr. Charles W. Baker*, for defendants in error. Judgment affirmed. JOHNSON, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur. NICHOLS, C. J., not participating.

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No. 14196. MIGNERY *v.* OLMSTEAD, ADMR., ET AL. Decided January 26, 1915. ERROR to Court of Appeals of Williams county. *Mr. John H. Schrider* and *Mr. Edward Gaudern*, for plaintiff in error. *Mr. Charles A. Bowersox* and *Mr. R. L.*

Without Opinion.

*Starr*, for defendants in error. Judgment affirmed. See journal entry.

It is ordered and adjudged by this court, that the judgment of the said court of appeals be, and the same is hereby, affirmed; this court being of the opinion that while the trial court erred in the admission of the testimony of the heirs of the decedent yet this testimony was not prejudicial for the reason that plaintiff in error having selected his remedy when he prepared and presented his claim against the estate of James Mignery, deceased, he could not maintain an action upon the instrument in question for the land.

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14286. *RITER v. SHIRK*, ADMX. Decided January 26, 1915. ERROR to Court of Appeals of Hancock county. *Mr. Jacob Line; Mr. C. B. Dwiggin*s and *Messrs. Franks & Franks*, for plaintiff in error. *Messrs. Price & Price; Messrs. Blackford & Blackford* and *Messrs. Stickle & Cessna*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14647. *THE CINCINNATI TRACTION CO. v. PIERMAN*. Decided January 26, 1915. ERROR to

## Cases Reported

Court of Appeals of Hamilton county. *Mr. Miller Outcalt*, for plaintiff in error. *Messrs. Philip & S. C. Roettinger*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14648. THE CINCINNATI TRACTION CO. *v.* BEEBE, ADMR. Decided January 26, 1915. ERROR to Court of Appeals of Hamilton county. *Messrs. Kinkead & Rogers*, for plaintiff in error. *Mr. W. P. Hohmann* and *Mr. Thomas L. Michie*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 13872. THE DAYTON GAS CO. ET AL. *v.* GOTTSCHALL, A TAXPAYER, ET AL. Decided February 2, 1915. ERROR to Circuit Court of Montgomery county. *Messrs. McMahon & McMahon* and *Mr. Frank S. Breene*, city solicitor, for plaintiffs in error. *Mr. L. W. James* and *Mr. Earl H. Turner*, for defendants in error. Judgment affirmed. JOHNSON, WANAMAKER, JONES and MATTHIAS, JJ., concur. NICHOLS, C. J., DONAHUE and NEWMAN, JJ., dissent.

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No. 14017. COFFEE *v.* THE ALLIANCE BANK Co. Decided February 2, 1915. ERROR to Circuit Court of Stark county. *Messrs. Bow, Amerman & Mills* and *Mr. David Fording*, for plaintiff in

## Without Opinion.

error. *Messrs. Hart & Koehler*, for defendant in error. Judgment of the circuit court reversed and that of the common pleas affirmed. JOHNSON, WANAMAKER, JONES and MATTHIAS, JJ., concur.

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No. 14200. GEIST *v.* EHRICH. Decided February 2, 1915. ERROR to Court of Appeals of Cuyahoga county. *Mr. Dorr E. Warner*, for plaintiff in error. *Mr. William Rockwell* and *Messrs. Wing, Myler & Turney*, for defendant in error. Judgment reversed. Judgment for plaintiff in error. See journal entry.

It is ordered and adjudged by this court, that the judgment of the said court of appeals be, and the same hereby is, reversed:

The court finds that the residence building to be constructed on the property involved is permissible under the covenants of the deed, under the authority of *Hunt v. Held*, decided by this court June 23, 1914 [90 Ohio St., 280].

The court further finds that the erection of such building, being more than fifteen feet from the Warren Road street line, is also permissible under the covenants of the deed of defendant in error.

And coming now to render the judgment that the court of appeals should have rendered, it is hereby ordered and adjudged that the judgment of the court of common pleas in said cause be and the same is hereby affirmed.

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14201. *SCHILLING v. TURNBULL*. Decided February 2, 1915. ERROR to Court of Appeals of Stark county. *Mr. Everett L. Mills; Mr. Oscar M. Abt and Mr. Walter S. Ruff*, for plaintiff in error. *Mr. Charles C. Upham and Mr. John C. Welty*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14202. *TAYLOR v. GEYER, EXR., ET AL.* Decided February 2, 1915. ERROR to Court of Appeals of Muskingum county. *Mr. Harry C. Shepherd*, for plaintiff in error. *Mr. E. F. O'Neal*, for defendants in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur. NICHOLS, C. J., not participating.

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No. 14204. *HAMILTON v. RAUB*. Decided February 2, 1915. ERROR to Court of Appeals of Mahoning county. *Mr. E. H. Moore; Mr. S. M. Strain and Mr. Chas. J. Jackson*, for plaintiff in error. *Mr. J. H. C. Lyon; Mr. I. B. Miller and Mr. Geo. Swanston*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, NEWMAN, JONES and MATTHIAS, JJ., concur. WANAMAKER, J., not participating.

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No. 14208. *KARLINGER v. THE GUND BREWING Co.* Decided February 2, 1915. ERROR to

## Without Opinion.

Court of Appeals of Cuyahoga county. *Messrs. Howell, Roberts & Duncan*, for plaintiff in error. *Mr. M. P. Mooney*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14215. THE CITIZENS SAVINGS BANK & TRUST CO. *v.* ROBISON, ADMX. Decided February 2, 1915. ERROR to Court of Appeals of Butler county. *Messrs. Andrews & Andrews*, for plaintiff in error. *Mr. Patrick Gaynor*, for defendant in error. Judgment affirmed on authority of *Darst v. Phillips*, 41 Ohio St., 514. JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur. NICHOLS, C. J., not participating.

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No. 14495. THE BANKERS SURETY CO. ET AL. *v.* THE STATE, EX REL. CLINE, PROSECUTING ATTORNEY. Decided February 2, 1915. ERROR to Court of Appeals of Cuyahoga county. *Messrs. Goulder, Day, White & Garry* and *Messrs. Smith, Taft & Arter*, for plaintiffs in error. *Mr. Cyrus Locher*, prosecuting attorney; *Mr. Frederick W. Green* and *Mr. G. A. Howells*, assistant prosecuting attorney, for defendant in error. Judgment modified and affirmed as modified. See journal entry.

It appearing that the plaintiff in error A. K. Spencer as treasurer of Cuyahoga county, Ohio, was entitled by statute to receive the five per cent penalty added to the delinquent personal tax list

## Cases Reported

as and for his compensation for the collection thereof as treasurer the court find that the judgment is excessive to the extent of five per cent. of the total sum collected, and that the judgment of the common pleas court in favor of the defendant in error and against the plaintiffs in error should have been for three thousand four hundred eleven dollars and fifty cents (\$3,411.50) and that the excess of the judgment over and above that amount is contrary to law, it is, therefore, ordered, considered and adjudged that said judgment of the common pleas court of Cuyahoga county be, and the same hereby is, modified by reducing it to the sum of \$3,411.50 with interest thereon from the date of the judgment in the common pleas court of Cuyahoga county, to-wit: December 27, 1912, and as so modified the same is affirmed.

It is further ordered and adjudged that each party to this action pay their own costs in this court, taxed at \$. . . . . and in the court of appeals of Cuyahoga county, taxed at \$. . . . .

JOHNSON, DONAHUE, WANAMAKER and MATTHIAS, JJ., concur.

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No. 14496. SPENCER ET AL. *v.* THE STATE, EX REL. CLINE, PROSECUTING ATTORNEY. Decided February 2, 1915. ERROR to Court of Appeals of Cuyahoga county. *Messrs. Smith, Taft & Arter* and *Messrs. Goulder, Day, White & Garry*, for plaintiffs in error. *Mr. Cyrus Locher*, prosecuting attorney, for defendant in error. Judgment

Without Opinion.

modified and affirmed as modified. See journal entry.

It appearing that the plaintiff in error A. K. Spencer as treasurer of Cuyahoga county, Ohio, was entitled by statute to receive the five per cent penalty added to the delinquent personal tax list as and for his compensation for the collection thereof as treasurer the court find that the judgment is excessive to the extent of five per cent. of the total sum collected, and that the judgment of the common pleas court in favor of the defendant in error and against the plaintiffs in error should have been for three thousand four hundred eleven dollars and fifty cents, (\$3,411.50) and that the excess of the judgment over and above that amount is contrary to law, it is therefore, ordered, considered and adjudged that said judgment of the common pleas court of Cuyahoga county be, and the same hereby is, modified by reducing it to the sum of \$3,411.50 with interest thereon from the date of the judgment in the common pleas court of Cuyahoga county, to-wit: December 27, 1912, and as so modified the same is affirmed.

It is further ordered and adjudged that each party to this action pay their own costs in this court, taxed at \$. . . . . and in the court of appeals of Cuyahoga county, taxed at \$. . . . .

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and MATTHIAS, JJ., concur.

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No. 14704. THE CINCINNATI, HAMILTON & DAYTON RY. CO. v. BUXTON, ADMR. Decided



## Cases Reported

February 2, 1915. ERROR to Court of Appeals of Hamilton county. *Mr. Morison R. Waite* and *Mr. John R. Schindel*, for plaintiff in error. *Messrs. Schorr & Wesselmann* and *Mr. Thos. L. Michie*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, JONES and MATTHIAS, JJ., concur.

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No. 14218. GOODALL *v.* THE CINCINNATI, HAMILTON & DAYTON RAILWAY Co. Decided February 9, 1915. ERROR to Court of Appeals of Hamilton county. *Mr. Scott Bonham*, for plaintiff in error. *Messrs. Harmon, Colston, Goldsmith & Hoadly*, for defendant in error. Judgment reversed. Cause remanded for new trial. See journal entry:

It is ordered and adjudged by this court, that the judgment of the said court of appeals in so far as final judgment is rendered in favor of The Cincinnati, Hamilton & Dayton Railway Company and against Charles W. Goodall, dismissing his petition be, and the same hereby is, reversed.

It appearing further that the judgment of the court of appeals necessarily involves the weight of evidence the judgment of said court reversing the judgment of the superior court of Cincinnati is affirmed, and this cause is remanded to said superior court of Cincinnati for further proceedings and trial according to law.

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

## Without Opinion.

No. 14220. AETNA INSURANCE CO. ET AL. *v.* THE HOCKING VALLEY RAILWAY CO. Decided February 9, 1915. ERROR to Court of Appeals of Franklin county. *Mr. J. W. Mooney* and *Mr. G. E. Bibbee*, for plaintiffs in error. *Messrs. Wilson & Rector*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER and JONES, JJ., concur.

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No. 14225. MARSHALL ET AL. *v.* MARSTERS. Decided February 9, 1915. ERROR to Court of Appeals of Trumbull county. *Messrs. Gillmer, Gillmer & Gillmer*, for plaintiffs in error. *Messrs. Hine, Kennedy & Manchester*, for defendant in error. Judgment affirmed on authority of *Lamb v. Rickets*, 11 Ohio, 311. JOHNSON, DONAHUE, NEWMAN, JONES and MATTHIAS, JJ., concur. WANAMAKER, J., dissents.

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No. 14227. MELLINGER ET AL. *v.* MELLINGER. Decided February 9, 1915. ERROR to Court of Appeals of Columbiana county. *Mr. K. L. Cobourn*, for plaintiffs in error. *Mr. S. W. Ramsey*, for defendant in error. Judgment of the court of appeals reversed and that of the common pleas affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

## Cases Reported

No. 14228. *HARVUOT v. STONE*. Decided February 9, 1915. ERROR to Court of Appeals of Hamilton county. *Mr. C. J. McDiarmid* and *Mr. Frank M. Coppock*, for plaintiff in error. *Messrs. Hosea & Knight*, for defendant in error. Judgment of the court of appeals reversed and that of the common pleas affirmed.

Journal entry: It appearing that there is no error apparent in the record of the trial court in this cause prejudicial to the plaintiff in that court, and that the question of negligence of the defendant, if any, and that the question of contributory negligence on the part of the plaintiff, if any, was fairly submitted to the jury in that court, it is ordered and adjudged by this court that the judgment of the court of appeals be, and the same hereby is, reversed, and the judgment of the common pleas court affirmed. — REPORTER.

DONAHUE, NEWMAN, JONES and MATTHIAS, JJ., concur. NICHOLS, C. J., and WANAMAKER, J., dissent.

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No. 14230. *THE NORTHERN OHIO TRACTION & LIGHT Co. v. CUTLER, ADMX.* Decided February 9, 1915. ERROR to Court of Appeals of Portage county. *Messrs. Rowley, Mather & Eagleson* and *Mr. A. S. Cole*, for plaintiff in error. *Mr. C. B. Newton* and *Mr. B. S. Johnson*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

## Without Opinion.

No. 14240. THE CINCINNATI NORTHERN RAILROAD CO. *v.* THE VAN WERT LUMBER CO. ET AL. Decided February 9, 1915. ERROR to Court of Appeals of Van Wert county. *Mr. H. N. Quigley; Mr. L. J. Hackney and Mr. H. G. Richie*, for plaintiff in error. *Mr. H. L. Conn*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and JONES, JJ., concur. MATTHIAS, J., not participating.

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No. 14256. THE ADENA RAILROAD CO. *v.* MORGAN. Decided February 9, 1915. ERROR to Court of Appeals of Belmont county. *Messrs. Squire, Sanders & Dempsey and Mr. Gordon D. Kinder*, for plaintiff in error. *Mr. George Thornburg*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14436. BERGIN ET AL. *v.* McCABE. Decided February 9, 1915. ERROR to Court of Appeals of Tuscarawas county. *Mr. J. F. Greene*, for plaintiffs in error. *Mr. W. B. Stevens*, for defendant in error. Judgment of the court of appeals reversed and that of the common pleas affirmed.

Journal entry: It appearing to the court that the certificates of stock were delivered to the Denison National Bank as collateral security for a loan of money then and there made by the bank to the owner of the stock prior to the commence-

## Cases Reported

ment of the suit in attachment, and prior to the issue and service of garnishee process therein, and at a time when the bank and the owner of the stock had full right and authority to make and enter into the contract in reference thereto; and it further appearing that by the terms of the contract of pledge of this stock as collateral security for the repayment of money then loaned that the Dennison National Bank was authorized and empowered upon default in the payment of the debt, to secure which the certificates of stock were pledged, the bank had the right and authority to sell said stock and apply the proceeds thereof to the payment of said debt, yielding and paying to the owner of the stock the surplus, if any, over and above the amount of such indebtedness, the court finds that the attachment proceeding brought thereafter and the garnishee process issued and served upon the corporation issuing the certificates of stock could not and does not affect the right of the Dennison National Bank under its contract with the owner made at a time when no other person had any interest or rights in said stock, or the certificates evidencing the ownership thereof, and that no other or further interest could be reached therein, except the surplus after paying the debt due the bank, and that the creditors of the pledgor could not by any process acquire any more rights in the stock, the certificates of which were pledged with the Dennison National Bank, than the owner of the stock had at the time of the commencement of the attachment proceedings; and it not appear-

Without Opinion.

ing that the Dennison National Bank exceeded its authority in making such sale or that said sale was fraudulently made, the purchaser thereunder acquired full and perfect title in and to said stock and the certificates evidencing the ownership thereof, free and clear of all claims or liens sought to be acquired by attachment and garnishee process after the contract of pledge was made.

It is, therefore, ordered and adjudged that the judgment of the court of appeals be, and the same hereby is, reversed and the judgment of the common pleas court is affirmed. — REPORTER.

NICHOLS, C. J., JOHNSON, DONAHUE and NEWMAN, JJ., concur. JONES and MATTHIAS, JJ., dissent.

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No. 14212. PATCH, ADMR., *v.* NORTON ET AL. Decided February 16, 1915. ERROR to Court of Appeals of Geauga county. *Mr. R. H. Patchin and Messrs. Hole & Hole*, for plaintiff in error. *Messrs. Alvord & Blakely and Mr. Wm. G. King*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14233. RAUH *v.* THE STATE, EX REL. UNVERFERTH, PROSECUTING ATTORNEY. Decided February 16, 1915. ERROR to Court of Appeals of Putnam county. *Mr. J. S. Ogan*, for plaintiff in error. *Mr. Timothy S. Hogan*, attorney general;

## Cases Reported

*Mr. A. A. Slaybaugh*, prosecuting attorney; *Messrs. Handy & Unverferth* and *Mr. J. W. Smith*, for defendant in error. Judgment modified and affirmed as modified.

The court find that in ascertaining the amount for which the court of common pleas should have rendered judgment in favor of the plaintiff against the defendant the court of appeals correctly found that the sum of \$376.75 should be added to the judgment, but this court finds that the item of \$22, referred to in the report of the referee, should have been deducted from the amount of the judgment rendered by the court of common pleas.

It is, therefore, ordered and adjudged by this court that the judgment of the court of appeals be, and the same is hereby, modified in this, to-wit: that the amount of said judgment as found by said court of appeals be, and the same is hereby, reduced in the sum of \$22 as of the date of the entry of said judgment of the court of appeals.

It is further ordered and adjudged that as thus modified the judgment of the said court of appeals be, and the same is hereby, affirmed.

It is further ordered that the costs in this court be paid one-half by each of said parties.

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14246. HAMILTON *v.* THE PEOPLES NATIONAL BANK OF ZELIENOPLE. Decided February 16, 1915. ERROR to Court of Appeals of Ma-

Without Opinion.

honing county. *Messrs. Arrel, Wilson, Harrington & DeFord*, for plaintiff in error. *Mr. Wylie McCaslin* and *Mr. S. D. L. Jackson*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14253. THE STATE, EX REL. UNVERFERTH, PROSECUTING ATTORNEY, *v.* TALBOT. Decided February 16, 1915. ERROR to Court of Appeals of Putnam county. *Mr. A. A. Slaybaugh*, prosecuting attorney; *Messrs. Handy & Unverferth*, and *Mr. J. W. Smith*, for plaintiff in error. *Messrs. Bailey & Leasure*, for defendant in error. Judgment reversed on authority of *State, ex rel. Maher, v. Baker*, 88 Ohio St., 165. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14274. RHOADES, EXRX., *v.* SECOR ET AL. Decided February 16, 1915. ERROR to Court of Appeals of Lucas county. *Messrs. Rhoades & Rhoades*, for plaintiff in error. *Messrs. Smith & Beckwith* and *Mr. Rathbun Fuller*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, NEWMAN, JONES and MATTHIAS, JJ., concur. WANAMAKER, J., dissents.

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No. 14275. BROWN *v.* CHAPMAN. Decided February 16, 1915. ERROR to Court of Appeals of



## Cases Reported

Muskingum county. *Mr. Harry C. Shepherd*, for plaintiff in error. *Mr. E. E. Power*, for defendant in error. Judgment affirmed on authority of *McAllister v. Hartzell*, 60 Ohio St., 69. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14281. MONTI, ADMR., *v.* THE STEUBENVILLE & EAST LIVERPOOL RAILWAY & LIGHT CO. ET AL. Decided February 16, 1915. ERROR to Court of Appeals of Jefferson county. *Mr. J. W. Porter* and *Mr. P. P. Lewis*, for plaintiff in error. *Messrs. Miller & Miller*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14284. THE NORWOOD NATIONAL BANK *v.* CURTIS ET AL. Decided February 16, 1915. ERROR to Court of Appeals of Hamilton county. *Mr. George E. Mills* and *Mr. Otis H. Fisk*, for plaintiff in error. *Messrs. Pogue, Hoffheimer & Pogue*, for defendants in error. Judgment affirmed on authority of *Osborn v. McClelland*, 43 Ohio St., 284. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14285. THE NORWOOD NATIONAL BANK *v.* CURTIS ET AL. Decided February 16, 1915. ERROR

Without Opinion.

to Court of Appeals of Hamilton county. *Mr. George E. Mills* and *Mr. Otis H. Fisk*, for plaintiff in error. *Messrs. Pogue, Hoffheimer & Pogue*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14686. BAYER ET AL. *v.* STEIN. Decided February 16, 1915. ERROR to Court of Appeals of Hamilton county. *Messrs. Reece & Reece*, for plaintiffs in error. *Messrs. Kelley & Hauck*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14219. STURR *v.* THE CITY OF CINCINNATI. Decided February 23, 1915. ERROR to Court of Appeals of Hamilton county. *Mr. Scott Bonham*, for plaintiff in error. *Mr. Alfred Bettman* and *Mr. Walter M. Schoenle*, city solicitors; *Mr. Coleman Avery*; *Mr. Constant Southworth* and *Mr. Mitchell Wilby*, assistant city solicitors, for defendant in error. Final judgment of the court of appeals reversed and judgment of court of appeals reversing judgment of common pleas affirmed. Cause remanded. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

## Cases Reported

No. 14264. *SESSIONS, ADMR., v. RICKLY*. Decided February 23, 1915. ERROR to Court of Appeals of Franklin county. *Messrs. Ricketts & Cope* and *Mr. J. M. Sheets*, for plaintiff in error. *Mr. E. L. DeWitt*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14293. *BLACKBURN, BY ETC., v. ELLIS ET AL.* Decided February 23, 1915. ERROR to Court of Appeals of Mahoning county. *Mr. Charles Koonce, Jr.*, for plaintiff in error. *Mr. S. M. Thompson*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14297. *WILSON ET AL. v. YAEKLE*. Decided February 23, 1915. ERROR to Court of Appeals of Franklin county. *Mr. John W. Wilson* and *Messrs. Pugh & Pugh*, for plaintiffs in error. *Messrs. Gumble & Gumble* and *Messrs. Huggins, Huggins & Hoover*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14302. *THE SECOND NATIONAL BANK OF BUCYRUS, OHIO, v. DEIBLE ET AL.* Decided February 23, 1915. ERROR to Court of Appeals of

Without Opinion.

Crawford county. *Messrs. Finley & Gallinger*, for plaintiff in error. *Messrs. Kean & Adair*; *Mr. Edward Vollrath* and *Mr. W. C. Beer*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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14303. GILL *v.* THE COLUMBUS RAILWAY & LIGHT Co. Decided February 23, 1915. ERROR to Court of Appeals of Franklin county. *Messrs. Lentz, Karns, Linton & Hengst*, for plaintiff in error. *Messrs. Booth, Keating, Peters & Pomerene*, for defendant in error. Final judgment of the court of appeals reversed and judgment of court of appeals reversing judgment of common pleas affirmed. Cause remanded.

Journal entry: This court finds that the fact (as shown by the special findings of fact made by the jury in connection with the general verdict) that plaintiff had alighted from the car of the defendant and had started toward the curb at the time he was assaulted by the employe of the defendant was not conclusive as matter of law, that the plaintiff had then ceased to be a passenger of the defendant, but the issue on that question as made by the pleadings was one of fact to be determined by the jury from all the evidence under proper instructions of the court, and this court, therefore, finds that the court of appeals erred in rendering final judgment in said cause in favor of the said railway and light company.

## Cases Reported

This court further finds that inasmuch as the entry of the judgment by the court of appeals does not state the ground upon which it reversed the judgment of the court of common pleas in favor of the plaintiff below against said defendant company and that from the record the court of appeals may have found that the verdict was against the weight of the evidence, which would have been a valid reason for reversing the judgment of the court of common pleas, but not for its entry of final judgment in the case.

It is, therefore, ordered and adjudged by this court that the judgment of the court of appeals be, and the same is hereby, reversed. And coming now to render the judgment which the court of appeals should have rendered on its finding, it is ordered and adjudged that the judgment of the court of common pleas be, and the same is hereby, reversed, and this cause is remanded to the court of common pleas for further proceedings according to law. — REPORTER.

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14306. THE BEACH CLIFF CO. *v.* VOLK, BY ETC. Decided February 23, 1915. ERROR to Court of Appeals of Cuyahoga county. *Messrs. Stearns, Chamberlain & Royon*, for plaintiff in error. *Mr. T. S. Dunlap*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE,

Without Opinion.

WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14309. THE BOARD OF COUNTY COMMISSIONERS OF SUMMIT COUNTY ET AL. *v.* THE NORTHERN OHIO TRACTION & LIGHT CO. Decided February 23, 1915. ERROR to Court of Appeals of Summit county. *Messrs. McCarty & McClintock*, for plaintiffs in error. *Messrs. Rowley, Mather & Eagleson*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, NEWMAN, JONES and MATTHIAS, JJ., concur. WANAMAKER, J., not participating.

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No. 14313. CHAMBERS ET AL. *v.* THE CITY OF AKRON. Decided February 23, 1915. ERROR to Court of Appeals of Summit county. *Mr. William T. Spear; Mr. William E. Pardee; Mr. E. H. Nesbitt and Mr. J. V. Welsh*, for plaintiffs in error. *Mr. Jonathan Taylor*, city solicitor, and *Mr. S. D. Kenfield*, assistant city solicitor, for defendant in error. Judgment affirmed on authority of *Crawford v. Village of Delaware*, 7 Ohio St., 460, and *City of Akron v. Huber*, 78 Ohio St., 372. NICHOLS, C. J., JOHNSON, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14320. PARKER *v.* HINTZ. Decided February 23, 1915. ERROR to Court of Appeals of Sandusky county. *Mr. Jesse Vickery*, for plaintiff

## Cases Reported

in error. *Mr. D. A. Heffner*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14321. SCHROTH, ADMR., ET AL. *v.* NOBLE ET AL. Decided February 23, 1915. ERROR to Court of Appeals of Seneca county. *Mr. Geo. E. Schroth; Mr. Willis Bacon; Mr. Mark L. Leister; Mr. Walter K. Keppel and Mr. Florence Cronise*, for plaintiffs in error. *Mr. Charles E. Derr; Mr. Milton Sayler and Messrs. Ragan & Ragan*, for defendants in error. Judgment of the court of appeals reversed and that of common pleas court affirmed on authority of *Stembel et al. v. Martin et al.*, 50 Ohio St., 495, and *Lyon et al. v. French et al.*, 70 Ohio St., 466, affirming *Lyon et al. v. Lyon et al.*, 24 C. C., 498.

Journal entry: It appearing from the record that the owner of the property described in the petition died intestate; that the same is non-ancestral property and descends under paragraph 6 of Section 8574, General Code, to the next of kin of the blood of the intestate; that the "next of kin" as used in this statute refers to those persons who take intestate property under the statutes of descent and distribution (*Steel, Admr., v. Kurtz*, 28 Ohio St., 191, approved and followed); that each paragraph of Section 8574, General Code, must be read in connection with all the other paragraphs for the purpose of determining who are next of kin of the blood of the intestate; and that in Section 8574,

## Without Opinion.

General Code, relating to the descent and distribution of non-ancestral property, the whole blood is preferred to the half-blood (*Stembel v. Martin*, 50 Ohio St., 495, and *Lyon et al. v. French et al.*, 70 Ohio St., 466, affirming *Lyon v. Lyon*, 24 C. C., 498, 1 C. C., N. S., 246, approved and followed).

It is, therefore, considered and adjudged by this court that the judgment of the court of appeals be, and the same hereby is, reversed, and this court coming now to render the judgment that the court of appeals should have rendered, it is ordered, adjudged and decreed that the judgment of the common pleas court be, and the same hereby is, affirmed.

— REPORTER.

DONAHUE, NEWMAN, JONES and MATTHIAS, JJ., concur. JOHNSON and WANAMAKER, JJ., dissent.

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No. 14325. *THE JULIAN & KOKENGE CO. v. HOLMES, RECR.* Decided March 2, 1915. ERROR to Court of Appeals of Hamilton county. *Mr. J. L. Kohl*, for plaintiff in error. *Mr. Orville K. Jones* and *Mr. Joseph W. O'Hara*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14326. *MUSSER ET AL., EXRS., v. THE CITY HOSPITAL OF AKRON.* Decided March 2, 1915. ERROR to Court of Appeals of Summit county. *Messrs. Musser, Kimber & Huffman*, for plaintiffs in error. *Mr. A. H. Commings*; *Mr. P. B.*



## Cases Reported

*Treash and Mr. C. C. Benner*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, NEWMAN, JONES and MATTHIAS, JJ., concur. WANAMAKER, J., not participating.

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No. 14332. DUNCAN, RECR., *v.* BREDBECK ET AL., PARTNERS AS G. H. BREDBECK & Co. Decided March 2, 1915. ERROR to Court of Appeals of Ottawa county. *Messrs. Young & Young*, for plaintiff in error. *Mr. Chas. H. Graves and Mr. A. L. Duff*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14342. LYON, JR., ADMR., *v.* D. LAMOND & SON. Decided March 2, 1915. ERROR to Court of Appeals of Lawrence county. *Mr. Wm. J. Mahoney and Mr. T. N. Ross* for plaintiff in error. *Messrs. Johnson & Jones*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, NEWMAN and MATTHIAS, JJ., concur. JONES, J., not participating.

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No. 14356. BIGHAM ET AL. *v.* HARLAN, EXR. Decided March 2, 1915. ERROR to Court of Appeals of Morrow county. *Mr. Lee Elliott; Mr. Geo. W. Sharp and Mr. Benj. Olds*, for plaintiffs in error. *Messrs. Harlan & Wood*, for defendant in error. Judgment reversed. See journal entry.

## Without Opinion.

It appearing from the facts found and determined by the court of appeals that the testatrix held said estate coming from her deceased husband, Samuel Geller, in a trust capacity, and the conditions of said trust were that at the decease of the testatrix one-half of said estate should go to the relatives of Samuel Geller and one-half to the relatives of Nancy A. Geller and that it was the intention of said testatrix to devise the one-half of her said estate to the relatives of her deceased husband and the one-half to the relatives of said testatrix and that the issue of the deceased legatees should take the legacies devised to them, all in accordance with her obligations under the trust.

The court, therefore, finds that the issue of any deceased legatees are entitled to the legacy bequeathed to their respective parents. It is, therefore, ordered and adjudged by this court that the judgment of said court of appeals be, and the same is hereby, reversed, and this cause is remanded to the said court of appeals with instructions to enter its judgment and decree directing the said executor to distribute the funds of said estate in accordance with the above finding of this court and otherwise according to law.

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14366. MCCORD *v.* MCCORD ET AL. Decided March 2, 1915. ERROR to Court of Appeals

## Cases Reported

of Hamilton county. *Mr. W. A. Hicks and Mr. Frank E. Wood*, for plaintiff in error. *Messrs. Robertson & Buchwalter*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14176. THE INTER-STATE STEAMSHIP CO. *v.* GUARRINO ET AL. Decided March 9, 1915. ERROR to Court of Appeals of Ashtabula county. *Messrs. Holding, Masten, Duncan & Leckie*, for plaintiff in error. *Mr. Herman J. Nord; Mr. J. E. Pilmer; Mr. C. W. Dille and Messrs. Reed & Eichelberger*, for defendants in error. Judgment of the court of appeals reversed and that of common pleas affirmed. NICHOLS, C. J., DONAHUE, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14177. THE UNION DOCK CO. *v.* GUARRINO ET AL. Decided March 9, 1915. ERROR to Court of Appeals of Ashtabula county. *Messrs. Reed & Eichelberger*, for plaintiff in error. *Mr. Herman J. Nord; Mr. J. E. Pilmer; Mr. C. W. Dille and Messrs. Holding, Masten, Duncan & Leckie*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

## Without Opinion.

No. 14357. *BROWN v. LANNING*. Decided March 9, 1915. ERROR to Court of Appeals of Morrow county. *Messrs. Spear, Mills, Knight & Godfrey* and *Messrs. Harlan & Wood*, for plaintiff in error. *Messrs. Owen & Carr* and *Mr. J. W. Barry*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.

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No. 14358. *THE CINCINNATI, HAMILTON & DAYTON RY. CO. v. THE CITY OF SIDNEY*. Decided March 9, 1915. ERROR to Court of Appeals of Shelby county. *Messrs. Waite & Schindel*, for plaintiff in error. *Mr. C. C. Hall* and *Mr. D. F. Mills*, city solicitor, for defendant in error. Judgment affirmed on authority of *L. S. & M. S. Ry. Co. v. Elyria*, 69 Ohio St., 414, and *Wabash Railroad Co. v. Defiance*, 52 Ohio St., 262. JOHNSON, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur. NICHOLS, C. J., and DONAHUE, J., dissent.

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No. 14362. *DEMENT ET AL. v. DANIEL ET AL.* Decided March 9, 1915. ERROR to Court of Appeals of Lawrence county. *Messrs. Anderson & Robison*, for plaintiffs in error. *Messrs. Johnson & Jones*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and MATTHIAS, JJ., concur. JONES, J., not participating.

## Cases Reported

No. 14372. **BILLMAN ET AL. v. THE FOURTH NATIONAL BANK OF DAYTON, OHIO, ET AL.** Decided March 9, 1915. ERROR to Court of Appeals of Montgomery county. *Messrs. Van Deman & Pickrel*, for plaintiffs in error. *Messrs. Gottschall & Turner; Messrs. McKemy & Cline and Messrs. Munger & Kennedy*, for defendants in error. Judgment affirmed. **JOHNSON, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ.**, concur.

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No. 14377. **LEE ET AL., PARTNERS AS HONG FOOK & Co., v. THOMA.** Decided March 9, 1915. ERROR to Court of Appeals of Hamilton county. *Mr. Louis H. Capelle and Mr. Wm. Thorndyke*, for plaintiffs in error. *Messrs. Worthington, Strong & Stettinius; Mr. W. A. Hicks and Mr. Jas. R. Jordan*, for defendant in error. Judgment affirmed. **NICHOLS, C. J., JOHNSON, WANAMAKER, NEWMAN and MATTHIAS, JJ.**, concur.

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No. 14380. **McCOWEN ET AL. v. RYAN ET AL.** Decided March 9, 1915. ERROR to Court of Appeals of Seneca county. *Messrs. Wagner & Knepper and Messrs. Dore & Dore*, for plaintiffs in error. *Mr. William D. Pence*, for defendants in error. Final judgment of the court of appeals reversed and judgment of court of appeals reversing judgment of common pleas affirmed. Cause remanded. **NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ.**, concur.

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No. 14733. THE CINCINNATI TRACTION Co. *v.* PIERCE. Decided March 9, 1915. ERROR to Court of Appeals of Hamilton county. *Messrs. Kinkead & Rogers*, for plaintiff in error. *Messrs. Snyder & Dickerson* and *Mr. Thos. L. Michie*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN, JONES and MATTHIAS, JJ., concur.



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## BANKS AND BANKING—

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Where question of issuing municipal bonds is submitted, under Section 3939 *et seq.*, General Code, in determining two-thirds vote, under Section 3947, General Code, blank and unintelligible ballots not considered, when. See *Wellsville v. Connor*, 28.

The act authorizing levy for interest and sinking funds (103 O. L., 112), to redeem Cincinnati Southern Railway terminal facility and betterment bonds (102 O. L., 111), conforms to Section 11, Article 12, Constitution. See *Cincinnati v. Harris*, 151.

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3. *County duties to be performed by county officers, when*—The general assembly has the authority to create new duties and require such duties to be performed by the incumbents of an existing office, but where the duties so created are in their nature and extent county official duties, they must be attached to a county office and must be required to be performed by a county officer duly elected by the electors of the county, or lawfully appointed to fill vacancy in that office. *Ib.*

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Right of purchasers of certificates of stock given as collateral and sold by bank upon default, as against attachment and garnishment. See *Bergin v. McCabe*, 427.

## CERTIORARI—

Constitutional law—Conflict of judgment of court of appeals with circuit court—Writ of *certiorari*—Section 6, Article 4, Constitution (1912). See *McLarren v. Johnson*, 103.

## CHANGE OF VENUE—

One indicted for embezzlement of insolvent bank funds is entitled to change of venue, when. See *Baxter v. State*, 167.

Charge to Jury—Cincinnati Southern Railway.

**CHARGE TO JURY—**

Criminal law—Murder—Evidence—Impeachment—Testimony of physicians—Rebuttal—Admission and competency of evidence—Expert witnesses—Hypothetical question—Charge to jury—Preponderance of evidence. See *Hoover v. State*, 41.

Malpractice—Physician—Expert testimony—Degree of skill required—Charge to jury. See *Hier v. Stites*, 127.

It is the duty of the trial court to charge the jury at the time evidence of other similar offenses is offered, when. See *Barter v. State*, 187.

It is error for court to explain legal effect of answer to special finding of fact, under Section 11463, General Code, or instruct jury as to harmonizing special and general verdicts, when. See *Walsh v. Thomas' Sons*, 210.

Instructions to jury as to returning verdict by three-fourths of members, under Section 11455, General Code (103 O. L., 11), erroneous, but not prejudicial if verdict unanimous, when. See *Railway Co. v. Helber*, 246.

Error to omit to charge jury that contributory negligence defeats recovery, when. See *Klein v. Goldstein*, 388.

Error to charge jury to consider only evidence that appeals to sense of justice and fairness. See *Fox v. Jewell*, 409.

Error to charge jury as to measure of damages where same fixed by terms of contract, when. See *Crites v. Pillmore-Anderegg Co.*, 412.

**CINCINNATI SOUTHERN RAILWAY—**

1. *Cincinnati Southern Railway—Bond issues—Interest and sinking fund—103 O. L., 112, conforms to Section 11, Article 12, Constitution—The act of March 5, 1913 (103 O. L., 112), supplementary to the act of May 17, 1911 (102 O. L., 111), conforms to the requirement of Section 11, Article 12 of the Constitution of Ohio. Cincinnati v. Harris*, 151.

2. *Acts authorizing bond issue—Conforms to constitution, when—This act and the act of May 17, 1911 (102 O. L., 111), is the legislation under which the indebtedness evidenced by the proposed issue of bonds is incurred within the meaning of Section 11, Article 12 of the Constitution of Ohio. Ib.*

## Circuit Court—Cities and Villages.

## CIRCUIT COURT—

Constitutional law—Conflict of judgment of court of appeals with circuit court—Writ of *certiorari*—Section 6, Article 4, Constitution (1912). See *McLarren v. Johnson*, 103.

## CITIES AND VILLAGES—

The amendment of Section 5649-2, General Code (103 O. L., 552), relating to interest and sinking fund, merely eliminates parts of original section, and the words "heretofore" and "hereafter" refer to June 2, 1911. See *State, ex rel. Durr, v. Spiegel*, 13.

Where question of issuing municipal bonds is submitted, under Section 3939 *et seq.*, General Code, in determining two-thirds vote, under Section 3947, General Code, blank and unintelligible ballots not considered, when. See *Wellsville v. Connor*, 28.

Ordinance granting franchise for furnishing water supply—Section 3982, General Code—Public utility rates—Section 614-44, General Code—Referendum—Section 4227-2, General Code—Municipality liable, when. See *State, ex rel., v. Burris, Treas.*, 70.

Sections 1465-62 to 1465-67, General Code (103 O. L., 72), relating to workmen's compensation for state, county, city and township employes, are constitutional. See *Porter et al. v. Hopkins*, 74.

The act authorizing levy for interest and sinking funds (103 O. L., 112), to redeem Cincinnati Southern Railway terminal facility and betterment bonds (102 O. L., 111), conforms to Section 11, Article 12, Constitution. See *Cincinnati v. Harris*, 151.

Section 1, Article 18, Constitution (1912), relating to classification of municipalities, is not self-executing—Sections 3497, 3498 and 3499, General Code, regulating transition from one class to another, not inconsistent with said section—Federal census controls, when. See *Murray v. State, ex rel. Nestor*, 220.

Public utilities commission, acting under Section 614-51, General Code, may relieve street railway company from municipal ordinance directing extension of lines, and its order will not be reversed by supreme court, when. See *Cincinnati v. Commission*, 331.

Publication of municipal ordinances and resolutions in one newspaper is a compliance with Section 4227 *et seq.*, General Code, when. See *Elmwood Place v. Schanzle*, 354.

Apportionment of cost of grade crossing elimination as fixed by ordinance and verdict of jury. See *Traction Co. v. Akron*, 382.



## City Solicitor—Closing Polls.

## CITY SOLICITOR—

Amended Section 5649-3b, General Code (103 O. L., 552, and 104 O. L., 237), designating who shall constitute county budget commission, is unconstitutional and void, and repealing clauses are invalid. See *State, ex rel. Pogue, v. Groom*, 1.

## CLAIMS—

Under Section 2416, General Code, county commissioners may compound or release claim for damages against road contractor for breach of contract, when—*Pro tanto* pay may be allowed or rejected upon abandonment of contract, when—Contract of settlement cannot be rescinded, when. See *State, ex rel. Jewett, v. Sayre*, 85.

Receivership—Creditors' committee—Assignment of claims by creditors—Interagreement by two stockholders—Stockholder's liability—Purchase of claims by one stockholder—Accounting in action to enforce liability—Remedies. See *Jones v. Turney & Jones Co.*, 122.

## CLASSIFICATION—

Section 1, Article 18, Constitution (1912), relating to classification of municipalities, is not self-executing—Sections 3497, 3498 and 3499, General Code, regulating transition from one class to another, not inconsistent with said section—Federal census controls, when. See *Murray v. State, ex rel. Nestor*, 220.

## CLERK OF SUPREME COURT—

Section 1500, General Code (103 O. L., 10)—*Providing for appointment—Constitutional*—The act of February 4, 1913 (103 O. L., 10), so amending Section 1500, General Code, as to provide that this court shall appoint its own clerk, and repealing the original section which provided for his election by the electors of the state, is not repugnant to any provision of the constitution. *State, ex rel. McKean, v. Graves*, 23.

## CLOSING POLLS—

Statutory provision fixing time for opening and closing polls is directory—Election not invalidated because polls kept open after statutory closing time, when. See *In re Chagrin Falls*, 306.

## Cocaine—Common Pleas Court.

## COCAINE—

One convicted for illegal sale of cocaine, under Section 12672, General Code, cannot raise question of validity of Section 7388-6, Revised Statutes, providing indeterminate sentence, by *habeas corpus*. See *In re Allen*, 315.

## COLD PLUNGE—

Death from dilation of heart caused by cold plunge bath not within terms of accident insurance policy, when. See *Casualty Co. v. Johnson*, 155.

## COLLATERAL—

Rights of purchasers of certificates of stock given as collateral and sold by bank upon default, as against attachment and garnishment. See *Bergin v. McCabe*, 427.

## COLLATERAL SUIT—

Judgment of court refusing to amend return of service of summons is final and cannot be relitigated in collateral suit, when. See *Paulin v. Sparrow*, 279.

## COMMISSIONERS—

Under Section 2416, General Code, county commissioners may compound or release claim for damages against road contractor for breach of contract, when—*Pro tanto* pay may be allowed or rejected upon abandonment of contract, when—Contract of settlement cannot be rescinded, when. See *State, ex rel. Jewett, v. Sayre*, 85.

County commissioners cannot refuse to award county funds to bank offering highest interest, under Section 2717, General Code, because sureties named in proposal for inactive deposits are same as for active deposits, when. See *Commissioners v. State, ex rel.*, 145.

## COMMON PLEAS COURT—

Jurisdiction to grant alimony where divorce granted adverse party. See *Boling v. Boling*, 390.

Authority to establish conservancy districts and provisions for organization and membership of districts (104 O. L., 13), constitutional—Section 6828-6, General Code (104 O. L., 16),

## Common Pleas Court—Constitutional Law.

## COMMON PLEAS COURT—Continued.

authorizing appeal from refusal to establish conservancy districts, repugnant to Section 6, Article 4, Constitution (1912). See *Snyder v. Deeds*, 407.

## COMPENSATION—

No implied contract to pay for services rendered by member of family and mutuality of contract necessary, when—Written or parol contracts—Degree of proof where defendant a living person or a personal representative. See *Merrick v. Ditaler*, 256.

Notes given for services rendered during lifetime are a debt and not a gift, when. See *Grindle v. Missionary Assn.*, 374.

## CONFLICTS—

Constitutional law—Conflict of judgment of court of appeals with circuit court—Writ of *certiorari*—Section 6, Article 4, Constitution (1912). See *McLarren v. Johnson*, 103.

## CONSERVANCY ACT—

The conservancy act (104 O. L., 18)—Authority to establish districts and provisions for organization and membership, constitutional—Reasons for declaring act an emergency measure, valid—Provision for appeal from refusal to establish district, unconstitutional. See *Snyder v. Deeds*, 407.

## CONSTITUTIONAL AMENDMENTS—

Mandamus does not lie to compel secretary of state to recount or direct recount of ballots cast on constitutional amendments and preserved under Section 5090-1, General Code (103 O. L., 265). See *State, ex rel., v. Graves, etc.*, 113.

The constitution and statutes provide a means for adoption or rejection of constitutional amendments—Section 9a, Article 15, relating to home rule, legally submitted and adopted—Validity of amendment. See *Hockett v. Licensing Board*, 176.

## CONSTITUTIONAL LAW—

Amended Section 5649-3b, General Code (103 O. L., 552, and 104 O. L., 237), designating who shall constitute county budget commission, is unconstitutional and void—County official duties must be performed by county officials—Where an act providing

## Constitutional Law.

## CONSTITUTIONAL LAW—Continued.

substitute and repealing an existing law is declared unconstitutional, the repealing clause is invalid. See *State, ex rel. Pogue, v. Groom*, 1.

The act of February 4, 1913 (103 O. L., 10), amending Section 1500, General Code, by providing for appointment of clerk of supreme court, is constitutional. See *State, ex rel. McKean, v. Graves*, 23.

Sections 1465-62 to 1465-67, General Code (103 O. L., 72), relating to workmen's compensation for state, county, city and township employes, are constitutional. See *Porter et al. v. Hopkins*, 74.

The sales-by-weight-or-measure law (Section 6418-1, General Code; 103 O. L., 136) violates Section 1, Article 1, Constitution, and is invalid. See *In re Steube*, 135.

Authority conferred upon common pleas court to establish conservancy districts and provisions for organization and membership of districts (104 O. L., 13) constitutional—Reasons for declaring act an emergency measure, under Section 1d, Article 2, Constitution (1912), valid. See *Snyder v. Deeds*, 407.

Where an amendatory act contains entire section as amended and repeals the original statute (Section 16, Article 2, Constitution), the amended section is construed, how—Amended sections considered with entire subject, when—Section 5649-2, General Code, as amended 103 O. L., 552. See *State, ex rel. Durr, v. Spiegel*, 13.

Where an amendatory act contains provisions of original section and original statute is repealed (Section 16, Article 2, Constitution), such provisions are regarded as continuous and undisturbed, when. See *In re Allen*, 315.

Conflict of judgment of court of appeals with circuit court—Writ of *certiorari*—Section 6, Article 4, Constitution (1912). See *McLarren v. Johnson*, 103.

Section 6828-6, General Code (104 O. L., 16), authorizing appeal from refusal of common pleas court to establish conservancy district, repugnant to Section 6, Article 4, Constitution (1912). See *Snyder v. Deeds*, 407.

The act authorizing levy for interest and sinking funds (103 O. L., 112), to redeem Cincinnati Southern Railway terminal facility and betterment bonds (102 O. L., 111), conforms to Section 11, Article 12, Constitution. See *Cincinnati v. Harris*, 151.

The constitution and statutes provide a means for adoption or rejection of constitutional amendments—Section 9a, Article 15,

## Constitutional Law—Construction of Constitution.

## CONSTITUTIONAL LAW—Continued.

relating to home rule on intoxicating liquors, legally submitted and adopted—Validity of amendment. See *Hockett v. Licensing Board*, 176.

Section 1, Article 18, Constitution (1912), relating to classification of municipalities, is not self-executing—Sections 3497, 3498 and 3499, General Code, regulating transition from one class to another, not inconsistent with said section—Federal census controls, when. See *Murray v. State, ex rel. Nestor*, 220.

Constitutionality of a law determined by operative effect, when—Inspection of oils, etc., lawful exercise of police power—Ohio oil-inspection act affecting interstate commerce contravenes clause 2, Section 10, Article 1, U. S. Constitution, and is unconstitutional because imposing fees in excess of necessary inspection expenses. See *Castle v. Mason*, 296.

## CONSTRUCTION OF CONSTITUTION—

The sales-by-weight-or-measure law (Section 6418-1, General Code; 103 O. L., 136) violates Section 1, Article 1, Constitution, and is invalid. See *In re Steube*, 135.

Authority conferred upon common pleas court to establish conservancy districts and provisions for organization and membership of districts (104 O. L., 13) constitutional—Reasons for declaring act an emergency measure, under Section 1d, Article 2, Constitution (1912), valid. See *Snyder v. Deeds*, 407.

Where an amendatory act contains entire section as amended and repeals the original statute (Section 16, Article 2, Constitution), the amended section is construed, how—Amended sections considered with entire subject, when—Section 5649-2, General Code, as amended 103 O. L., 552. See *State, ex rel. Durr, v. Spiegel*, 13.

Where an amendatory act contains provisions of original section and original statute is repealed (Section 16, Article 2, Constitution), such provisions are regarded as continuous and undisturbed, when. See *In re Allen*, 315.

Constitutional law—Conflict of judgment of court of appeals with circuit court—Writ of *certiorari*—Section 6, Article 4, Constitution (1912). See *McLarren v. Johnson*, 103.

Section 6828-6, General Code (104 O. L., 16) authorizing appeal from refusal of common pleas court to establish conservancy district, repugnant to Section 6, Article 4, Constitution (1912). See *Snyder v. Deeds*, 407.

## Construction of Constitution—Construction of Statutes.

## CONSTRUCTION OF CONSTITUTION—Continued.

The act authorizing levy for interest and sinking funds (103 O. L., 112), to redeem Cincinnati Southern Railway terminal facility and betterment bonds (102 O. L., 111), conforms to Section 11, Article 12, Constitution. See *Cincinnati v. Harris*, 151.

Section 9a, Article 15, Constitution, relating to home rule on intoxicating liquors, was regularly and legally initiated, submitted and carried in 1914. See *Hockett v. Licensing Board*, 177.

Section 1, Article 18, Constitution (1912), relating to classification of municipalities, is not self-executing—Sections 3497, 3498 and 3499, General Code, regulating transition from one class to another, not inconsistent with said section—Federal census controls, when. See *Murray v. State, ex rel. Nestor*, 220.

Constitutionality of a law determined by operative effect, when—Inspection of oils, etc., lawful exercise of police power—Ohio oil-inspection act affecting interstate commerce contravenes clause 2, Section 10, Article 1, U. S. Constitution, and is unconstitutional because imposing fees in excess of necessary inspection expenses. See *Castle v. Mason*, 296.

## CONSTRUCTION OF STATUTES—

Public utility rates—Section 614-44, General Code—Franchise for furnishing water supply—Section 3982, General Code—Referendum—Section 4227-2, General Code. See *State, ex rel., v. Burris, Treas.*, 70.

Public utilities commission, acting under Section 614-51, General Code, may relieve street railway company from municipal ordinance directing extension of lines, and its order will not be reversed by supreme court, when. See *Cincinnati v. Commission*, 331.

Sections 844 to 871, General Code, providing for inspection of oils, contravene clause 2, Section 10, Article 1, U. S. Constitution, relating to interstate commerce. See *Castle v. Mason*, 296.

Workmen's compensation—Filing first notice and preliminary application bars action against employer, when—Sections 1465-61 and 1465-44, General Code. See *Zilch v. Bomgardner*, 205.

Sections 1465-62 to 1465-87, General Code (103 O. L., 72), relating to workmen's compensation for state, county, city and township employees, are constitutional. See *Porter et al. v. Hopkins*, 74.

The act of February 4, 1913 (103 O. L., 10), amending Section 1500, General Code, by providing for appointment of clerk of

## Construction of Statutes.

## CONSTRUCTION OF STATUTES—Continued.

- supreme court, is constitutional. See *State, ex rel. McKean, v. Graves*, 23.
- Section 2166, General Code (103 O. L., 29)—Indeterminate sentence erroneous but not void, when—Burglary—Section 12438, General Code—Sentence of convicts—Section 12374, General Code. See *In re Winslow*, 328.
- Under Section 2416, General Code, county commissioners may compound or release claim for damages against road contractor for breach of contract, when—*Pro tanto* pay may be allowed, when—Rescission of contract of settlement. See *State, ex rel. Jewett, v. Sayre*, 85.
- Sureties offered by bank making proposal for county funds, under Section 2717, General Code, are sufficient, when. See *Commissioners v. State, ex rel.*, 145.
- Sections 3497, 3498 and 3499, General Code, regulating method of transition of municipal corporations from one class to another, are not inconsistent with Section 1, Article 18, Constitution (1912)—Federal census controls, when. See *Murray v. State, ex rel. Nestor*, 220.
- Where question of issuing municipal bonds is submitted, under Section 3939 *et seq.*, General Code, in determining two-thirds vote, under Section 3947, General Code, blank and unintelligible ballots not counted—Where majority or proportionate vote is necessary to determine result, blank and unintelligible ballots considered, when. See *Wellsville v. Connor*, 28.
- Municipal corporations—Ordinance granting franchise for furnishing water supply—Section 3982, General Code—Public utility rates—Section 614-44, General Code—Referendum—Section 4227-2, General Code—Municipality liable, when. See *State, ex rel., v. Burris, Treas.*, 70.
- Publication of municipal ordinances in one newspaper is a compliance with Section 4227 *et seq.*, General Code, when. See *Elmwood Place v. Schanzle*, 354.
- Franchises—Referendum—Section 4227-2, General Code—Public utility rates—Section 614-44, General Code—Municipal water supply—Section 3982, General Code. See *State, ex rel., v. Burris, Treas.*, 70.
- Election not invalidated because polls kept open after hours prescribed by Section 5056, General Code (103 O. L., 21). See *In re Chagrin Falls*, 308.

## Construction of Statutes.

## CONSTRUCTION OF STATUTES—Continued.

Mandamus does not lie to compel secretary of state to recount or direct recount of ballots cast on constitutional amendments and preserved under Section 5090-1, General Code (103 O. L., 265). See *State, ex rel., v. Graves, etc.*, 113.

The amendment of Section 5649-2, General Code (103 O. L., 552), relating to limitation of tax rate, merely eliminates parts of the original section, and the words "heretofore" and "hereafter" refer to June 2, 1911. See *State, ex rel. Durr, v. Spiegel*, 13.

Amended Section 5649-3b, General Code (103 O. L., 552, and 104 O. L., 237), designating who shall constitute county budget commission, is unconstitutional and void—County official duties must be performed by county officials—Where an act providing substitute and repealing an existing law is declared unconstitutional, the repealing clause is invalid. See *State, ex rel. Pogue, v. Groom*, 1.

In an action on account by a member of unlawful combination, under Section 6391, General Code, a defendant injured in his business may set up damages allowed by Section 6397, General Code, as counterclaim or set-off. See *Guyton v. Eastern Elec. Co.*, 106.

The sales-by-weight-or-measure law (Section 6418-1, General Code; 103 O. L., 136) violates Section 1, Article 1, Constitution, and is invalid. See *In re Steube*, 135.

Section 6828-6, General Code (104 O. L., 16), authorizing appeal from refusal of common pleas court to establish conservancy district, repugnant to Section 6, Article 4, Constitution (1912)—Section 6828-79, General Code (104 O. L., 64), giving reasons for declaring act an emergency measure, valid. See *Snyder v. Deeds*, 407.

A partnership operating under fictitious name may commence action under Section 8104, General Code, without alleging compliance with registration act, but noncompliance is a defense and will defeat action unless compliance under Section 8099, General Code, when. See *Walsh v. Thomas' Sons*, 210.

Order by contractor to material man not an unconditional order or acceptance, under Section 8231, General Code, when. See *Rigby v. Palmer Co.*, 371.

Property is nonancestral, descends under Section 8574, General Code, and whole-blood heirs preferred, when. See *Schroth, Admr., v. Noble*, 438.



## Construction of Statutes.

## CONSTRUCTION OF STATUTES—Continued.

Instructions to jury as to returning verdict by three-fourths of members under Section 11455, General Code (103 O. L., 11), erroneous, but not prejudicial if verdict unanimous, when. See *Railway Co. v. Helber*, 246.

It is error for court to explain legal effect of answer to special finding of fact, under Section 11463, General Code, or instruct jury as to harmonizing special and general verdicts, when. See *Walsh v. Thomas' Sons*, 210.

Lessor and lessee—Rights and liabilities of lessee and his assignee for rents—Section 12206, General Code—Sureties—Oil lease—Liability of assignee for royalties. See *Gas Co. v. Oil Co.*, 35.

Criminal law—Conviction for burglary—Indeterminate sentence to penitentiary—Claim of illegal detention—Application for *habeas corpus*—Sentence erroneous, but not void, when—Sections 2166, 12374, 12438 and 13767, General Code. See *In re Winslow*, 328.

Criminal law—Joint indictment—Nolled against one defendant—Discharge claimed by remaining defendant—Offense joint and several—Sections 12472, 12473 and 12474, General Code—Embezzling or misapplying bank funds—Section 44, Thomas banking act. See *State v. Keith*, 132.

Officers of bank organized under free-banking act (49 O. L., 41) may be guilty of embezzlement under Section 12474, General Code, when. See *State v. Barkman*, 248.

Amended Section 12672, General Code, providing penitentiary sentence upon second conviction for illegal sale of cocaine, is not *ex post facto* or retroactive, when—*Habeas corpus*—Constitutionality of indeterminate-sentence law. See *In re Allen*, 315.

Criminal law—Embezzlement—Public moneys loaned to bank—Aider and abettor—Knowledge—Sections 12873, 12874 and 13674, General Code. See *State v. Cameron et al.*, 50.

Bill of exceptions by prosecuting attorney or attorney general in criminal case, under Section 13681, General Code, must be filed within forty days after rendition of judgment, when. See *State v. Cox*, 141.

Section 15150-4, General Code (103 O. L., 112), authorizing levy for interest and sinking funds to redeem Cincinnati Southern Railway terminal facility and betterment bonds (102 O. L., 111), conforms to Section 11, Article 12, Constitution. See *Cincinnati v. Harris*, 151.

## Contracts.

## CONTRACTS—

1. *Compensation for services by member of family—No implied obligation, when—Express contract necessary, when—*In an action to recover compensation for services when it appears that the plaintiff was a member of the family of the person for whom the services were rendered, no obligation to pay for the services will be implied, and the plaintiff cannot recover in such case unless it be established that there was an express contract upon the one side to perform the services for compensation and upon the other side to accept the services and pay for them. *Merrick v. Ditzler*, 256.
  2. *Written or parol contract—Evidence—Degree of proof—Personal representative of defendant—*Such contract may be in writing or it may rest entirely in parol, and it may be proved by direct or indirect evidence. If the defense is made by the personal representatives of a deceased person, the contract, whether in writing or parol, must be established by clear and convincing proof. *Ib.*
  3. *Where living person a defendant—Degree of proof—*Where the party who is alleged to have made such express contract is a living person, defendant in the suit and competent to testify, it is sufficient in order to entitle the plaintiff to recover that the contract, whether in writing or in parol, be established by the preponderance of the evidence. (*Hinkle et al., Exrs., v. Sage*, 67 Ohio St., 256, distinguished.) *Ib.*
- Municipal corporations—Ordinance granting franchise for furnishing water supply—Section 3982, General Code—Public utility rates—Section 614-44, General Code—Referendum—Section 4227-2, General Code.—Municipality liable, when. See *State ex rel., v. Burris*, 70.
- Under Section 2416, General Code, county commissioners may compound or release claim for damages against road contractor for breach of contract, when—*Pro tanto* pay may be allowed or rejected upon abandonment of contract, when—Contract of settlement cannot be rescinded, when. See *State, ex rel. Jewett, v. Sayre*, 85.
- The sales-by-weight-or-measure law (Section 6418-1, General Code; 103 O. L., 136) violates Section 1, Article 1, Constitution, relating to freedom to contract. See *In re Steube*, 135.
- Death from dilation of heart caused by cold plunge bath not within terms of accident insurance policy, when. See *Casualty Co. v. Johnson*, 155.

## Contracts—Corporations.

## CONTRACTS—Continued.

A wife is bound by false representations made by husband in selling her real estate, when. See *Gleason v. Bell*, 268.

Bond to secure building contract not obtained by fraud or concealment nor to compound a felony, when. See *Bittner v. Title Co.*, 369.

Time for recuperation included in total-disability period for accident insurance, when. See *Amer. Assur. Co. v. Dickson*, 380.

Error to charge jury as to measure of damages where same fixed by terms of contract, when. See *Crites v. Pillmore-Anderegg Co.*, 412.

Presentation of claim against estate bars specific performance of agreement to convey real estate, when. See *Mignery v. Olmstead*, 416.

Rights of purchasers of certificates of stock given as collateral and sold by bank upon default, as against attachment and garnishment. See *Bergin v. McCabe*, 427.

## CONTRIBUTORY NEGLIGENCE—

Error to omit to charge jury that contributory negligence defeats recovery, when. See *Klein v. Goldstein*, 388.

## CONVERSION OF FUNDS—

Officers of bank organized under free-banking act (49 O. L., 41) may be guilty of embezzlement under Section 12474, General Code, when. See *State v. Barkman*, 248.

## CORPORATIONS—

The act authorizing levy for interest and sinking funds (103 O. L., 112), to redeem Cincinnati Southern Railway terminal facility and betterment bonds (102 O. L., 111), conforms to Section 11, Article 12, Constitution. See *Cincinnati v. Harris*, 151.

Insurance agent selling corporation stock under an *alias* and embezzling proceeds is estopped to deny agency, when—Questions of agency and time of forming criminal intent are jury questions, when. See *State v. Gross*, 161.

Banks organized under free-banking act (49 O. L., 41), continue body politic until repeal of the act—The Thomas banking act (99 O. L., 269) did not repeal the free-banking act—Embezzlement. See *State v. Barkman*, 248.

## Counterclaim—County Commissioners.

## COUNTERCLAIM—

In an action on account by a member of unlawful combination, under Section 6391, General Code, a defendant injured in his business may set up damages allowed by Section 6397, General Code, as counterclaim or set-off. See *Guyton v. Eastern Elec. Co.*, 106.

## COUNTY COMMISSIONERS—

1. *May compound or release—Claim for breach of road contract*—Section 2416, General Code—The claim of a county for damages against a contractor for breach of contract for a road improvement is a debt due the county within the meaning of Section 2416, General Code, which the board of county commissioners may compound or release in whole or in part. *State, ex rel. Jewett, v. Sayre*, 85.
2. *Pro tanto pay upon abandonment of road improvement—May be allowed or rejected, when*—Where a contractor wholly abandons a contract for a road improvement upon the claim that the contract is impossible of performance by reason of the nonexistence of the material required by the contract and demands pay *pro tanto* for the value of the material furnished and labor performed in part performance of the contract before discovering that the contract is impossible of performance, such a demand may be the subject of a legal claim against the county which the board of county commissioners has the authority to pass upon and allow or reject in whole or in part. *Ib.*
3. *Contract of settlement irrevocable, when*—Where there is a debt due the county that the board of county commissioners under authority conferred by Section 2416, General Code, may compound or release in whole or in part, and the debtor in good faith is making a claim against the county that the board of county commissioners has the right and authority to allow or reject in whole or in part, a contract made and entered into by the board of commissioners with the debtor by which the debtor is released from the payment of all or part of the debt due the county in consideration of his releasing the county from liability for all or part of his claim against the county, is binding upon the county and the debtor alike, and neither can be released from the terms of such contract of settlement without the consent of the other contracting party. *Ib.*

## County Commissioners—County Treasurer.

## COUNTY COMMISSIONERS—Continued.

4. *Settlement contract cannot be rescinded by resolution, when—*  
A resolution adopted by the board of county commissioners subsequently to the making of such a contract of settlement, and without the consent of the other contracting party, purporting to set aside and rescind the contract of settlement theretofore made and entered into does not effect a rescission of the contract. *Ib.*
5. *Award of county money to banks—Offering highest rate of interest—Sufficiency of security for active and inactive deposits—Provisions of Section 2717, General Code, are mandatory, when—*The provision in Section 2717, General Code, that the county commissioners shall award the use of the county money to the bank that offers the highest rate of interest therefor, provided proper sureties, securities or both, are tendered in the proposal, is mandatory, and those officials cannot refuse to award the use of the inactive deposits of the county to a bank offering the highest rate of interest therefor, for the sole reason that in its proposal for the inactive deposits it names as sureties the same individuals named in its proposal for the use of the active deposits of the county. *Commissioners v. State, ex rel., 145.*

## COUNTY DEPOSITARY—

County commissioners cannot refuse to award county funds to bank offering highest interest, under Section 2717, General Code, because sureties named in proposal for inactive deposits are same as for active deposits, when. See *Commissioners v. State, ex rel., 145.*

## COUNTY OFFICERS—

County official duties must be performed by county officials—Amended Section 5649-3b, General Code (103 O. L., 552, and 104 O. L., 237), designating who shall constitute county budget commission, is unconstitutional and void. See *State, ex rel. Pogue, v. Groom, 1.*

## COUNTY TREASURER—

County treasurer entitled to receive what per cent. of delinquent personal-tax penalties collected. See *Surety Co. v. State, ex rel., 421.*

## Court of Appeals—Court Procedure.

## COURT OF APPEALS—

Constitutional law—Conflict of judgment of court of appeals with circuit court—Writ of *certiorari*—Section 6, Article 4, Constitution (1912). See *McLarren v. Johnson*, 103.

Jurisdiction to grant alimony where divorce granted adverse party. See *Boling v. Boling*, 390.

Supreme court will not reverse judgment where court of appeals reversed on weight of evidence, when. See *Bevan v. Board of Foreign Missions*, 395.

Section 6828-6, General Code (104 O. L., 16), authorizing appeal from refusal of common pleas court to establish conservancy district, repugnant to Section 6, Article 4, Constitution (1912). See *Snyder v. Deeds*, 407.

Court of appeals does not acquire jurisdiction in absence of final order, when. See *Arbuckle v. Belting Co.*, 415.

## COURT PROCEDURE—

Criminal law—Murder—Evidence—Impeachment—Testimony of physicians—Rebuttal—Admission and competency of evidence—Expert witnesses—Hypothetical question—Charge to jury—Preponderance of evidence. See *Hoover v. State*, 41.

Mandamus does not lie to compel judge to sign bill of exceptions taken on trial before referee, when; the record without a bill presents all questions to appellate court, when. See *State, ex rel. Klorer, v. Fimple*, 99.

Malpractice—Physician—Expert testimony—Degree of skill required—Charge to jury. See *Hier v. Stites*, 127.

Criminal law—Joint indictment—Nolled against one defendant—Discharge claimed by remaining defendant—Offense joint and several—Sections 12472, 12473 and 12474, General Code—Embezzling or misapplying bank funds—Section 44, Thomas banking act. See *State v. Keith*, 132.

Bill of exceptions by prosecuting attorney or attorney general in criminal case, under Section 13681, General Code, must be filed within forty days after rendition of judgment, when. See *State v. Cox*, 141.

Questions of agency and time of forming criminal intent in embezzlement are jury questions and it is error to direct verdict, when. See *State v. Gross*, 161.

One indicted for embezzlement of insolvent bank funds is entitled to change of venue, when—Burden and degree of proof where evidence of other similar offenses is competent—Duty of

## Court Procedure.

## COURT PROCEDURE—Continued.

- trial court to charge the jury at time evidence offered. See *Baxter v. State*, 167.
- Altercations between counsel, side remarks and comment on evidence should not be tolerated by trial judge. See *Baxter v. State*, 167.
- It is error for court to explain legal effect of answer to special finding of fact, under Section 11463, General Code, or instruct jury as to harmonizing special and general verdicts, when. See *Walsh v. Thomas' Sons*, 210.
- Duty of court where counsel in argument to jury comment on special findings of fact. See *Walsh v. Thomas' Sons*, 210.
- Jury is entitled to pleadings during deliberations—Pleadings admissible in evidence to prove admissions or impeach statements, when. See *Railway Co. v. Helber*, 231.
- Instructions to jury as to returning verdict by three-fourths of members, under Section 11455, General Code (103 O. L., 11), erroneous, but not prejudicial if verdict unanimous, when. See *Railway Co. v. Helber*, 246.
- Jurisdiction over parties presumed, when—Defective return of service will not defeat jurisdiction, when—Return of service may be amended before or after judgment, when—Judgment refusing to amend return is final and cannot be relitigated, when. See *Paulin v. Sparrow*, 279.
- Errors in admission and rejection of evidence in action for fraud in securing stock subscription. See *Champney v. Braun*, 388.
- Error to omit to charge jury that contributory negligence defeats recovery, when. See *Klein v. Goldstein*, 388.
- Jurisdiction to grant alimony where divorce granted adverse party. See *Boling v. Boling*, 390.
- Supreme court will not reverse judgment where court of appeals reversed on weight of evidence, when. See *Bevan v. Board of Foreign Missions*, 395.
- Effect of failure to prepare bill of exceptions or include agreed statement of facts therein. See *Telephone Co. v. Telephone Co.*, 398.
- Error to charge jury to consider only evidence that appeals to sense of justice and fairness, when. See *Fox v. Jewell*, 409.
- Error to charge jury as to measure of damages where same fixed by terms of contract, when. See *Crites v. Pillmore-Anderegg Co.*, 412.

## Court Procedure—Criminal Law.

## COURT PROCEDURE—Continued.

Court of appeals does not acquire jurisdiction in absence of final order, when. See *Arbuckle v. Belting Co.*, 415.

## COURTS—

The act of February 4, 1913 (103 O. L., 10), amending Section 1500, General Code, by providing for appointment of clerk of supreme court, is constitutional. See *State, ex rel. McKean, v. Graves*, 23.

Objections to nomination of candidates will not be ordered heard and determined unless filed within proper time, when. See *State, ex rel. Scott, v. Swan*, 61.

Mandamus does not lie to compel judge to sign bill of exceptions taken on trial before referee, when; the record without a bill presents all questions to appellate court, when. See *State, ex rel. Klorer, v. Fimple*, 99.

Constitutional law—Conflict of judgment of court of appeals with circuit court—Writ of *certiorari*—Section 6, Article 4, Constitution (1912). See *McLarren v. Johnson*, 103.

## COVENANTS—

Erection of apartment or terrace does not violate "residence" clause in deed, when. See *Geist v. Ehrich*, 419.

## CREDITORS' COMMITTEE—

Receivership—Assignment of claims by creditors—Interagreement by two stockholders—Stockholder's liability—Purchase of claims by one stockholder—Accounting in action to enforce liability—Remedies. See *Jones v. Turney & Jones Co.*, 122.

## CRIMINAL LAW—

Murder—Evidence—Impeachment—Testimony of physicians—Rebuttal—Admission and competency of evidence—Expert witnesses—Hypothetical question—Charge to jury—Preponderance of evidence. See *Hoover v. State*, 41.

Embezzlement—Public moneys loaned to bank—Aider and abettor—Knowledge—Sections 12873, 12874 and 13674, General Code. See *State v. Cameron et al.*, 50.

Joint indictment—Nollied against one defendant—Discharge claimed by remaining defendant—Offense joint and several—Sections 12472, 12473 and 12474, General Code—Embezzling or



## Criminal Law—Damages.

## CRIMINAL LAW—Continued.

- misapplying bank funds—Section 44, Thomas banking act. See *State v. Keith*, 132.
- Bill of exceptions by prosecuting attorney or attorney general in criminal case, under Section 13681, General Code, must be filed within forty days after rendition of judgment, when. See *State v. Cox*, 141.
- Principle of estoppel in agency may be invoked in criminal cases, when—Insurance agent selling corporate stock under an *alias* and embezzling proceeds is estopped to deny agency, when—Questions of agency and time of forming criminal intent are jury questions, when. See *State v. Gross*, 161.
- One indicted for embezzlement of insolvent bank funds is entitled to change of venue, when—Burden and degree of proof where evidence of other similar offenses is competent—Duty of trial court to charge jury at time evidence offered. See *Baxter v. State*, 167.
- Officers of bank organized under free-banking act (49 O. L., 41) may be guilty of embezzlement under Section 12474, General Code, when. See *State v. Barkman*, 248.
- Amended Section 12672, General Code, providing penitentiary sentence upon second conviction for illegal sale of cocaine, is not *ex post facto* or retroactive, when—The question of validity of indeterminate-sentence law cannot be raised by *habeas corpus*, when. See *In re Allen*, 315.
- Conviction for burglary—Indeterminate sentence to penitentiary—Claim of illegal detention—Application for *habeas corpus*—Sentence erroneous but not void, when—Sections 2166, 12374, 12438 and 13767, General Code. See *In re Winslow*, 328.
- Rape—Variance between indictment and proof—Different transactions—Election by state—Date of offense—Evidence of act—Intercourse with others—Venereal disease—Physical examination of accused. See *Angeloff v. State*, 361.

## CROSSINGS—

- Apportionment of cost of grade crossing elimination as fixed by ordinance and verdict of jury. See *Traction Co. v. Akron*, 382.

## DAMAGES—

- In an action on account by a member of unlawful combination, under Section 6391, General Code, a defendant injured in his

## Damages—Defective Return.

## DAMAGES—Continued.

business may set up damages allowed by Section 6397, General Code, as counterclaim or set-off. See *Guyton v. Eastern Elec. Co.*, 106.

Malpractice—Physician—Expert testimony—Degree of skill required—Charge to jury. See *Hier v. Stites*, 127.

Where two causes combine to produce injury to one crossing bridge, liability determined by duty to maintain bridge, when—Duty of railroad to maintain substantial guardrails on bridge over undercut, when. See *Railway Co. v. Helber*, 231.

Facts necessary to justify recovery in action for false representations in sale of wife's real estate by husband; averment of knowledge of false representations unnecessary, when—Wife bound by husband's representations and acts, when. See *Gleason v. Bell*, 268.

Error to omit to charge jury that contributory negligence defeats recovery, when. See *Klein v. Goldstein*, 388.

Error to charge jury to consider only evidence that appeals to sense of justice and fairness, when. See *Fox v. Jewell*, 409.

Whether one who had alighted from car and was assaulted by employe was a passenger, jury question, when. See *Gill v. Ry. & Lt. Co.*, 435.

## DATE OF OFFENSE—

Criminal law—Rape—Variance between indictment and proof—Different transactions—Election by state—Date of offense—Evidence of act—Intercourse with others—Venereal disease—Physical examination of accused. See *Angeloff v. State*, 361.

## DEATH FROM BATH—

Death from dilation of heart caused by cold plunge bath not within terms of accident insurance policy, when. See *Casualty Co. v. Johnson*, 155.

## DEEDS—

Erection of apartment or terrace does not violate "residence" clause in deed, when. See *Geist v. Ehrich*, 419.

## DEFECTIVE RETURN—

Defective return of service will not defeat jurisdiction, when—Return may be amended before or after judgment, when—

## Defective Return—Deposits.

## DEFECTIVE RETURN—Continued.

Judgment of court refusing to amend return is final and cannot be relitigated in collateral suit, when. See *Paulin v. Sparrow*, 279.

## DEFENSE—

A partnership operating under fictitious name may commence action under Section 8104, General Code, without alleging compliance with registration act, but noncompliance is a defense and will defeat action unless compliance under Section 8099, General Code, when. See *Walsh v. Thomas' Sons*, 210.

## DEGREE OF PROOF—

Burden and degree of proof where evidence of other similar offenses is competent. See *Baxter v. State*, 187.

Degree of proof required where defendant a living person or a personal representative, in action by member of family for compensation for services. See *Merrick v. Ditsler*, 256.

## DEGREE OF SKILL—

Malpractice—Physician—Expert testimony—Degree of skill required—Charge to jury. See *Hier v. Stites*, 127.

## DELINQUENT TAXES—

County treasurer entitled to receive what per cent. of delinquent personal-tax penalties collected. See *Surety Co. v. State, ex rel.*, 421.

## DEMURRER—

Incapacity of partnership, doing business under fictitious name, to maintain action, cannot be raised by demurrer, when. See *Walsh v. Thomas' Sons*, 210.

## DEPOSITS—

County commissioners cannot refuse to award county funds to bank offering highest interest, under Section 2717, General Code, because sureties named in proposal for inactive deposits are same as for active deposits, when. See *Commissioners v. State, ex rel.*, 145.

## Descent and Distribution—Domestic Relations.

## DESCENT AND DISTRIBUTION—

Property is nonancestral, descends under Section 8574, General Code, and whole-blood heirs preferred, when. See *Schroth, Admr., v. Noble*, 438.

Issue of deceased legatee entitled to legacy bequeathed to parents, when. See *Bigham v. Harlan*, 440.

## DIFFERENT OFFENSES—

Criminal law—Rape—Variance between indictment and proof—Different transactions—Election by state—Date of offense—Evidence of act—Intercourse with others—Venereal disease—Physical examination of accused. See *Angeloff v. State*, 361.

## DIRECTED VERDICT—

Questions of agency and time of forming criminal intent in embezzlement are jury questions and it is error to direct verdict, when. See *State v. Gross*, 161.

## DISABILITY—

Time for recuperation included in total-disability period for accident insurance, when. See *Amer. Assur. Co. v. Dickson*, 380.

## DISEASE—

Criminal law—Rape—Variance between indictment and proof—Different transactions—Election by state—Date of offense—Evidence of act—Intercourse with others—Venereal disease—Physical examination of accused. See *Angeloff v. State*, 361.

## DIVORCE AND ALIMONY—

Jurisdiction to grant alimony where divorce granted adverse party. See *Boling v. Boling*, 390.

## DOMESTIC RELATIONS—

No implied contract to pay for services rendered by member of family, and mutuality of contract necessary, when—Written or parol contracts—Degree of proof where defendant a living person or a personal representative. See *Merrick v. Ditsler*, 256.

A wife is bound by false representations made by husband in selling her real estate, when. See *Gleason v. Bell*, 268.

## Domestic Relations—Elections.

## DOMESTIC RELATIONS—Continued.

Whether gift to legatee, subsequent to date of will, is an ademption depends upon testator's intention—Gift will be presumed an ademption of legacy *pro tanto* where made to child or one *in loco parentis*, when. See *Ellard, Exr., v. Ferris, Exr.*, 339. Jurisdiction to grant alimony where divorce granted adverse party. See *Boling, v. Boling*, 390.

## DOUBLE HOUSE—

Erection of apartment or terrace does not violate "residence" clause in deed, when. See *Geist v. Ehrich*, 419.

## DRUG LAWS—

One convicted for illegal sale of cocaine, under Section 12672, General Code, cannot raise question of validity of Section 7388-6, Revised Statutes, providing indeterminate sentence, by *habeas corpus*. See *In re Allen*, 815.

## ELECTION—

Criminal law—Rape—Variance between indictment and proof—Different transactions—Election by state—Date of offense—Evidence of act—Intercourse with others—Venereal disease—Physical examination of accused. See *Angeloff v. State*, 361.

## ELECTIONS—

1. *Municipal bond issue—Section 3939 et seq., General Code—Two-thirds vote—Blank or unintelligible ballots not considered, when—Section 3947, General Code—Where the question of issuing bonds by a municipality pursuant to Section 3939 et seq., General Code, is submitted to the electors at a special or general election, in ascertaining whether two-thirds of the voters voting at such election upon the question of issuing the bonds have voted in favor thereof, as required by Section 3947, blank ballots or unintelligible ballots are not to be considered. Wellsville v. Connor*, 28.
2. *Blank or unintelligible ballots considered, when—Majority or proportionate vote cast—Where a voter at an election duly held does not by his ballot express his choice for an office to be filled, or on a question submitted to the electors, his ballot should not be counted for such office or on the question. But if it is required by law that a majority or any certain pro-*

## Elections.

## ELECTIONS—Continued.

portion of the votes cast at the election should be in favor of a proposition in order that it should carry, then all the votes cast at the election, including blank and unintelligible ballots, must be considered. *Ib.*

3. *Primaries—Nominee must be affiliated with party nominating*—Under the existing law providing for primary elections a voter who is affiliated with one party cannot be nominated at such primary as a candidate for office upon a ticket of any other party. *State, ex rel. Murphy, v. Graves, 36.*
4. *Objections to nominations—Court will not require board of elections—To hear and determine objections, when*—A court will not compel a board of deputy state supervisors of elections to hear and determine objections to nominations of candidates for office, filed fifty-five days after the primary election and after the time in which the state supervisor of elections is directed by statute to certify the names of candidates with form of ballot to the board of deputy state supervisors of elections of the several counties of the state. *State, ex rel. Scott, v. Swan, 61.*
5. *Opening and closing polls—Statutory provision directory*—The provision of the statute fixing the time for opening and closing the polls at an election is directory and not mandatory. (*Fry v. Booth, 19 Ohio St., 25, approved and followed.*) *In re Chagrin Falls, 308.*
6. *Keeping polls open after statutory hours—Does not invalidate election, when*—An election will not be invalidated by reason of the fact that the election officers, instead of closing the polls at 5:30 p. m. as directed by statute, kept the same open until 6:00 o'clock p. m., where there was no fraud or collusion and where there were not illegal votes cast after the time fixed by statute for closing sufficient to change the result of the election. *Ib.*
7. *Constitutional amendments—Recount of ballots—Mandamus will not lie, when*—Section 5090-1, General Code (103 O. L., 265)—Under existing laws mandamus will not lie to compel the secretary of state to recount or direct a recount of the ballots counted at an election and preserved under the provisions of Section 5090-1, General Code (103 O. L., 265). *State, ex rel., v. Graves, etc., 113.*

The act of February 4, 1913 (103 O. L., 10), amending Section 1500, General Code, by providing for appointment of clerk of

## Elections—Embezzlement.

## ELECTIONS—Continued.

supreme court, is constitutional. See *State, ex rel. McKean, v. Graves*, 23.

Municipal corporations—Ordinance granting franchise for furnishing water supply—Section 3982, General Code—Public utility rates—Section 614-44, General Code—Referendum—Section 4227-2, General Code—Municipality liable, when. See *State, ex rel., v. Burris, Treas.*, 70.

The constitution and statutes provide ample and adequate legal machinery for initiation, submission and adoption of constitutional amendments—Section 9a, Article 15, Constitution, relating to home rule on intoxicating liquors, legally adopted and constitutional. See *Hockett v. Licensing Board*, 176.

## EMBEZZLEMENT—

1. *Change of venue*—Where a defendant is charged by indictment with the embezzlement of funds of an insolvent bank, and upon motion for a change of venue it is made to appear by the affidavit of the accused and the affidavit of ten credible persons residing in the county in which the indictment is returned, that there are residing in that county two hundred and fifty-seven stockholders and more than five thousand depositors in the bank, the funds of which he is charged with embezzling, and that in the opinion of the several persons making such affidavits he cannot have a fair and impartial trial in that county, a change of venue should be ordered. *Baxter v. State*, 167.

2. *Evidence of similar offenses*—*Burden and degree of proof*—Where evidence of other offenses of a similar character is competent to prove intent, and the accused has not theretofore been convicted of such offenses, the burden is upon the state to prove that the accused is guilty of such other offenses by the same degree of proof required in all criminal cases. *Ib.*

3. *Charge to jury*—Where evidence of former offenses is properly admitted to prove intent, it is the duty of the trial court, at the time such evidence is offered, to instruct the jury the purpose for which it is admitted. *Ib.*

Criminal law—Embezzlement—Public moneys loaned to bank—Aider and abettor—Knowledge—Sections 12873, 12874 and 12874, General Code. See *State v. Cameron et al.*, 50.

Criminal law—Joint indictment—Nollied against one defendant—Discharge claimed by remaining defendant—Offense joint and

## Embezzlement—Error Proceedings.

## EMBEZZLEMENT—Continued.

several—Sections 12472, 12473 and 12474, General Code—Embezzling or misapplying bank funds—Section 44, Thomas banking act. See *State v. Keith*, 132.

Principle of estoppel in agency may be invoked in criminal cases, when—Insurance agent selling corporate stock under an *alias* and embezzling proceeds is estopped to deny agency, when—Questions of agency and time of forming criminal intent are jury questions, when. See *State v. Gross*, 161.

Officers of bank organized under free-banking act (49 O. L., 41) may be guilty of embezzlement under Section 12474, General Code, when. See *State v. Barkman*, 248.

## EMERGENCY ACT—

Reasons given for declaring conservancy act (104 O. L., 64) an emergency measure, under Section 1d, Article 2, Constitution (1912), valid. See *Snyder v. Deeds*, 407.

## EMPLOYER AND EMPLOYEE—

Sections 1465-62 to 1465-67, General Code (103 O. L., 72), relating to workmen's compensation for state, county, city and township employes, are constitutional. See *Porter et al. v. Hopkins*, 74.

Workmen's compensation—Filing first notice and preliminary application bars action against employer, when—Sections 1465-61 and 1465-44, General Code. See *Zilch v. Bomgardner*, 205.

## ENTRY OF LAND—

Entry and occupation of land by the state—Act of February 4, 1825 (23 O. L., 56)—In construction of canals, was an appropriation and entitled owners to compensation, when—Fee-simple title in state, when—No adverse possession against state, when—Act of congress of May 24, 1828 (4 Stats. at Large, 306), operated as a present grant to state—Selection and use of lands vested fee-simple title in state as against federal government, when. See *Haynes v. Jones*, 197.

## ERROR PROCEEDINGS—

Appeal bond signed by codefendant insufficient, when. See *Steele v. Garn*, 381.



## Error Proceedings—Estoppel.

## ERROR PROCEEDINGS—Continued.

Effect of failure to prepare bill of exceptions or include agreed statement of facts therein. See *Telephone Co. v. Telephone Co.*, 898.

Court of appeals does not acquire jurisdiction in absence of final order, when. See *Arbuckle v. Belting Co.*, 415.

## ESCROW—

Action to recover purchase price of realty, held in escrow, prematurely brought, when. See *Straus v. Stern*, 401.

## ESTATES—

Notes given for services rendered during lifetime are a debt and not a gift, when. See *Grindle v. Missionary Assn.*, 374.

Presentation of claim against estate bars specific performance of agreement to convey real estate, when. See *Mignery v. Olmstead*, 416.

Property is nonancestral, descends under Section 8574, General Code, and whole-blood heirs preferred, when. See *Schroth, Admr., v. Noble*, 438.

Issue of deceased legatee entitled to legacy bequeathed to parents, when. See *Bigham v. Harlan*, 440.

## ESTOPPEL—

1. *May be invoked in criminal cases, when*—The principle of estoppel as applied to agency may be invoked in criminal as well as in civil cases. See *State v. Gross*, 161.

2. *Insurance agent estopped to deny agency—Because acting under another name—Embezzlement*—Where G., under the name of K., entered into a written contract of agency with an insurance company, and pursuant to such agency he sells corporate stock of such insurance company by virtue of which he collects money for the sale of such stock, but fails to account for such money to the said insurance company, upon prosecution for embezzlement, G., is estopped to deny that he was the agent of said insurance company upon the ground that K. was not his correct name, but upon the contrary his correct name was G. *Ib.*

3. *Agency and criminal intent question for jury—Directed verdict erroneous, when*—The question of agency and the question of the time of forming criminal intent in a charge of embezzlement are questions for the jury, and unless there is

## Estoppel—Examination.

## ESTOPPEL—Continued.

entire failure of proof as to any essential element of the crime of embezzlement, the court is not authorized to direct a verdict. *Ib.*

## EVIDENCE—

Criminal law—Murder—Evidence—Impeachment—Testimony of physicians—Rebuttal—Admission and competency of evidence—Expert witnesses—Hypothetical question—Charge to jury—Preponderance of evidence. See *Hoover v. State*, 41.

Malpractice—Physician—Expert testimony—Degree of skill required—Charge to jury. See *Hier v. Stites*, 127.

Burden and degree of proof where evidence of other similar offenses is competent—Duty of trial court to charge jury at time evidence offered. See *Baxter v. State*, 167.

Jury is entitled to pleadings during deliberations—Pleadings admissible in evidence to prove admissions or impeach statements, when. See *Railway Co. v. Helber*, 231.

Degree of proof required where defendant a living person or a personal representative, in action by member of family for compensation for services. See *Merrick v. Ditaler*, 256.

Judgment of court refusing to amend return of service of summons is final and evidence cannot be introduced on that issue, when. See *Paulin v. Sparrow*, 279.

Whether gift to legatee, subsequent to date of will, is an ademption depends upon testator's intention—Gift will be presumed an ademption of legacy *pro tanto* where made to child of one *in loco parentis* in absence of expressed intention or extrinsic evidence, when. See *Ellard, Exr., v. Ferris, Exr.*, 339.

Criminal law—Rape—Variance between indictment and proof—Different transactions—Election by state—Date of offense—Evidence of act—Intercourse with others—Venereal disease—Physical examination of accused. See *Angeloff v. State*, 361.

Errors in admission and rejection of evidence in action for fraud in securing stock subscription. See *Champney v. Braun*, 388.

## EXAMINATION—

Criminal law—Rape—Variance between indictment and proof—Different transactions—Election by state—Date of offense—Evidence of act—Intercourse with others—Venereal disease—Physical examination of accused. See *Angeloff v. State*, 361.

## Exceptions—False Representations.

## EXCEPTIONS—

Mandamus does not lie to compel judge to sign bill of exceptions taken on trial before referee, when; the record without a bill presents all questions to appellate court, when. See *State, ex rel. Klorer, v. Fimple*, 99.

Bill of exceptions by prosecuting attorney or attorney general in criminal case, under Section 13681, General Code, must be filed within forty days after rendition of judgment, when. See *State v. Cox*, 141.

Effect of failure to prepare bill of exceptions or include agreed statement of facts therein. See *Telephone Co. v. Telephone Co.*, 398.

## EXPERT TESTIMONY—

Criminal law—Murder—Evidence—Impeachment—Testimony of physicians—Rebuttal—Admission and competency of evidence—Expert witnesses—Hypothetical question—Charge to jury—Preponderance of evidence. See *Hoover v. State*, 41.

Malpractice—Physician—Expert testimony—Degree of skill required—Charge to jury. See *Hier v. Stites*, 127.

## EX POST FACTO LAWS—

Amended Section 12672, General Code, providing penitentiary sentence upon second conviction for illegal sale of cocaine, is not *ex post facto* or retroactive, when—The question of validity of indeterminate-sentence law cannot be raised by *habeas corpus*, when. See *In re Allen*, 315.

## EXPRESS CONTRACT—

Recovery cannot be had for services rendered by member of a family, in absence of express contract therefor, when. See *Merrick v. Ditzler*, 256.

## FALSE REPRESENTATIONS—

1. *Sale of real property—Facts necessary to recover—Pleading—Averments of knowledge by vendor unnecessary, when—Where a purchaser was induced to buy and pay for a city residence, by false representations made to him by the vendor as positive statements of fact clearly implying knowledge of the owner of the truth of the facts stated, and made under such circumstances that the vendor should have known of the falsity*

## False Representations—Fee-Simple Title.

**FALSE REPRESENTATIONS—Continued.**

of the representations, and they were of such a nature as to affect the character, utility and value of said property, and the purchaser had a right to and did rely thereon, and suffered damage by reason thereof, he may recover. In such a case an averment that the vendor knew the representations to be false and made them with intent to deceive is not essential. *Gleason v. Bell*, 268.

2. *Wife bound by husband's representations and acts, when*—If a woman permit her husband to manage and make contracts for sale of her property as his own and, in pursuance of her authority, he makes a sale of her property to one whom he induces to purchase by statements and representations relative to the character, utility and value of the property, upon which the purchaser would have a right to rely as coming from the owner, and she accepts the benefits of the contract and makes conveyances to the purchaser so procured, she is bound by the representations made. *Ib.*

**FEDERAL CENSUS—**

Federal census, and not municipal, controls in determining transition of municipalities from one class to another under Section 3497 *et seq.*, General Code. See *Murray v. State, ex rel. Nestor*, 220.

**FEES—**

Ohio oil-inspection act affecting interstate commerce contravenes clause 2, Section 10, Article 1, U. S. Constitution, and is unconstitutional because imposing fees in excess of necessary inspection expenses. See *Castle v. Mason*, 296.

**FEE-SIMPLE TITLE—**

Entry and occupation of land by the state—Act of February 4, 1825 (23 O. L., 56)—In construction of canals, was an appropriation and entitled owners to compensation, when—Fee-simple title in state, when—No adverse possession against state, when—Act of congress of May 24, 1828 (4 Stats. at Large, 806), operated as a present grant to state—Selection and use of lands vested fee-simple title in state as against federal government, when. See *Haynes v. Jones*, 197.

## Fictitious Names—Fraud.

## FICTITIOUS NAMES—

A partnership operating under fictitious name may commence action under Section 8104, General Code, without alleging compliance with registration act, but noncompliance will defeat action unless compliance under Section 8099, General Code, when. See *Walsh v. Thomas' Sons*, 210.

## FILING NOTICE—

Workmen's compensation—Filing first notice and preliminary application bars action against employer, when—Sections 1465-61 and 1465-44, General Code. See *Zilch v. Bomgardner*, 205.

## FINDINGS OF JURY—

It is error for court to explain legal effect of answer to special finding of fact, under Section 11463, General Code, or instruct jury as to harmonizing special and general verdicts, when. See *Walsh v. Thomas' Sons*, 210.

## FIRST NOTICE—

Workmen's compensation—Filing first notice and preliminary application bars action against employer, when—Sections 1465-61 and 1465-44, General Code. See *Zilch v. Bomgardner*, 205.

## FLOODS—

The conservancy act (104 O. L., 13)—Authority to establish districts and provisions for organization and membership, constitutional—Reasons for declaring act an emergency measure, valid—Provision for appeal from refusal to establish district, unconstitutional. See *Snyder v. Deeds*, 407.

## FRANCHISES—

Municipal corporations—Ordinance granting franchise for furnishing water supply—Section 3982, General Code—Public utility rates—Section 614-44, General Code—Referendum—Section 4227-2, General Code—Municipality liable, when. See *State, ex rel., v. Burris, Treas.*, 70.

## FRAUD—

An election will not be invalidated because polls kept open after statutory closing time, in absence of fraud, when. *In re Chagrin Falls*, 808.

## Fraud—General Assembly.

## FRAUD—Continued.

Bond to secure building contract not obtained by fraud or concealment nor to compound a felony, when. See *Bittner v. Title Co.*, 369.

Errors in admission and rejection of evidence in action for fraud in securing stock subscription. See *Champney v. Braun*, 388.

Facts necessary to justify recovery in action for false representations in sale of wife's real estate by husband; averment of knowledge of false representations unnecessary, when—Wife bound by husband's representations and acts, when. See *Gleason v. Bell*, 268.

## FREE-BANKING ACT—

Banks organized under free-banking act (49 O. L., 41) continue body politic until repeal of the act—The Thomas banking act (99 O. L., 269) did not repeal the free-banking act—Embezzlement. See *State v. Barkman*, 248.

## GARNISHMENT—

Rights of purchasers of certificates of stock given as collateral and sold by bank upon default, as against attachment and garnishment. See *Bergin v. McCabe*, 427.

## GENERAL ASSEMBLY—

Where an act providing substitute and repealing an existing law is declared unconstitutional, the repealing clause is invalid—Amended Section 5649-3b, General Code (103 O. L., 552, and 104 O. L., 237), designating who shall constitute county budget commission, is unconstitutional and void. See *State, ex rel Pogue, v. Groom*, 1.

Where an amendatory act contains entire section as amended and repeals the original statute (Section 16, Article 2, Constitution), the amended section is construed, how—Amended sections considered with entire subject, when—Section 5649-2, General Code, as amended 103 O. L., 552. See *State, ex rel Durr, v. Spiegel*, 13.

The act authorizing levy for interest and sinking funds (103 O. L., 112), to redeem Cincinnati Southern Railway terminal facility and betterment bonds (102 O. L., 111), conforms to Section 11, Article 12, Constitution. See *Cincinnati v. Harris*, 151.

## General Code.

## GENERAL CODE—

Public utility rates—Section 614-44, General Code—Franchise for furnishing water supply—Section 3982, General Code—Referendum—Section 4227-2, General Code. See *State, ex rel., v. Burris, Treas.*, 70.

Public utilities commission, acting under Section 614-51, General Code, may release street railway company from municipal ordinance directing extension of lines, and its order will not be reversed by supreme court, when. See *Cincinnati v. Commission*, 331.

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Section 2166, General Code (103 O. L., 29)—Indeterminate sentence erroneous but not void, when—Burglary—Section 12438, General Code—Sentence of convicts—Section 12374, General Code. See *In re Winslow*, 328.

Under Section 2416, General Code, county commissioners may compound or release claim for damages against road contractor for breach of contract, when—*Pro tanto* pay may be allowed, when—Rescission of contract of settlement. See *State, ex rel. Jewett, v. Sayre*, 85.

Sureties offered by bank making proposal for county funds, under Section 2717, General Code, are sufficient, when. See *Commissioners v. State, ex rel.*, 145.

Sections 3497, 3498 and 3499, General Code, regulating method of transition of municipal corporations from one class to another, are not inconsistent with Section 1, Article 18, Constitution (1912)—Federal census controls, when. See *Murray v. State, ex rel. Nestor*, 220.

## General Code.

## GENERAL CODE—Continued.

Where question of issuing municipal bonds is submitted, under Section 3939 *et seq.*, General Code, in determining two-thirds vote, under Section 3947, General Code, blank and unintelligible ballots not counted—Where majority or proportionate vote is necessary to determine result, blank and unintelligible ballots considered, when. See *Wellsville v. Connor*, 28.

Municipal corporations—Ordinance granting franchise for furnishing water supply—Section 3982, General Code—Public utility rates—Section 614-44, General Code—Referendum—Section 4227-2, General Code—Municipality liable, when. See *State, ex rel., v. Burris, Treas.*, 70.

Publication of municipal ordinances in one newspaper is a compliance with Section 4227 *et seq.*, General Code, when. See *Elmwood Place v. Schansle*, 354.

Franchises—Referendum—Section 4227-2, General Code—Public utility rates—Section 614-44, General Code—Municipal water supply—Section 3982, General Code. See *State, ex rel., v. Burris, Treas.*, 70.

Election not invalidated because polls kept open after hours prescribed by Section 5056, General Code (103 O. L., 21). See *In re Chagrin Falls*, 308.

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In an action on account by a member of unlawful combination, under Section 6391, General Code, a defendant injured in his business may set up damages allowed by Section 6397, Gen-



## General Code.

## GENERAL CODE—Continued.

- eral Code, as counterclaim or set-off. See *Guyton v. Eastern Elec. Co.*, 106.
- The sales-by-weight-or-measure law (Section 6418-1, General Code, 103 O. L., 136) violates Section 1, Article 1, Constitution, and is invalid. See *In re Steube*, 195.
- Section 6828-6, General Code (104 O. L., 16), authorizing appeal from refusal of common pleas court to establish conservancy district, repugnant to Section 6, Article 4, Constitution (1912)—Section 6828-79, General Code (104 O. L., 64), giving reasons for declaring act an emergency measure, valid. See *Snyder v. Deeds*, 407.
- A partnership operating under fictitious name may commence action under Section 8104, General Code, without alleging compliance with registration act, but noncompliance is a defense and will defeat action unless compliance under Section 8099, General Code, when. See *Walsh v. Thomas' Sons*, 210.
- Order by contractor to material man not an unconditional order or acceptance, under Section 8231, General Code, when. See *Rigby v. Palmer Co.*, 371.
- Property is nonancestral, descends under Section 8574, General Code, and whole-blood heirs preferred, when. See *Schroth, Admr., v. Noble*, 438.
- Instruction to jury as to returning verdict by three-fourths of members, under Section 11455, General Code (103 O. L., 11), erroneous, but not prejudicial if verdict unanimous, when. See *Railway Co. v. Helber*, 246.
- It is error for court to explain legal effect of answer to special finding of fact, under Section 11463, General Code, or instruct jury as to harmonizing special and general verdicts, when. See *Walsh v. Thomas' Sons*, 210.
- Lessor and lessee—Rights and liabilities of lessee and his assignee for rents—Section 12206, General Code—Sureties—Oil lease—Liability of assignee for royalties. See *Gas Co. v. Oil Co.*, 35.
- Criminal law—Conviction for burglary—Indeterminate sentence to penitentiary—Claim of illegal detention—Application for *habeas corpus*—Sentence erroneous but not void, when—Sections 2166, 12374, 12438 and 13767, General Code. See *In re Winslow*, 328.
- Criminal law—Joint indictment—Nollied against one defendant—Discharge claimed by remaining defendant—Offense joint and

## General Code—Gifts.

## GENERAL CODE—Continued.

- several—Sections 12472, 12473 and 12474, General Code—Embezzling or misapplying bank funds—Section 44, Thomas banking act. See *State v. Keith*, 132.
- Officers of bank organized under free-banking act (49 O. L., 41) may be guilty of embezzlement under Section 12474, General Code, when. See *State v. Barkman*, 248.
- Amended Section 12672, General Code, providing penitentiary sentence upon second conviction for illegal sale of cocaine, is not *ex post facto* or retroactive, when—*Habeas corpus*—Constitutionality of indeterminate-sentence law. See *In re Allen*, 315.
- Criminal law—Embezzlement—Public moneys loaned to bank—Aider and abettor—Knowledge—Sections 12873, 12874 and 13674, General Code. See *State v. Cameron et al.*, 50.
- Bill of exceptions by prosecuting attorney or attorney general in criminal case, under Section 13681, General Code, must be filed within forty days after rendition of judgment, when. See *State v. Cox*, 141.
- Section 15150-4, General Code (103 O. L., 112), authorizing levy for interest and sinking funds to redeem Cincinnati Southern Railway terminal facility and betterment bonds (102 O. L., 111), conforms to Section 11, Article 12, Constitution. See *Cincinnati v. Harris*, 151.

## GENERAL VERDICTS—

- It is error for court to explain legal effect of answer to special finding of fact, under Section 11463, General Code, or instruct jury as to harmonizing special and general verdicts, when. See *Walsh v. Thomas' Sons*, 210.

## GIFTS—

1. *Ademption—Testator's intention controls, when—Gift made subsequent to will*—Whether a gift made to a legatee by a testator subsequently to the date of the will is to be taken as an ademption of the legacy depends on the intention of the testator. *Ellard, Exr., v. Ferris, Exr.*, 339.
2. *Presumption of intended ademption—Where legatee a child of testator—Or one standing in loco parentis*—Where the subsequent gift is made to a child, or one to whom the testator stands *in loco parentis*, and the gift is of the same character or for the same purpose as the legacy, it will be presumed to

## Gifts—Guardrails.

## GIFTS—Continued.

be an ademption of the legacy *pro tanto* in the absence of an expressed intention to the contrary shown by the will or by extrinsic evidence. *Ib.*

8. *Legacy to one other than child—Intention to adeem not presumed, when*—Where the legacy is to a person other than a child of the testator, or to a person other than one to whom he stands *in loco parentis*, unless the gift is for the same specific purpose for which the legacy was intended, there is no presumption of such intention, but it must be clearly shown, either from the will itself or by extrinsic evidence, that the ademption was intended by the testator. *Ib.*

Notes given for services rendered during lifetime are a debt and not a gift, when. See *Grindle v. Missionary Assn.*, 374.

## GOVERNMENT LANDS—

Where the state, acting under authority of act of congress (4 Stats. at Large, 306), selected and used lands for canal purposes, fee-simple title vested in state as against federal government and all persons claiming, when. See *Haynes v. Jones*, 197.

## GRADE CROSSINGS—

Apportionment of cost of grade crossing elimination as fixed by ordinance and verdict of jury. See *Traction Co. v. Akron*, 382.

## GRANTOR AND GRANTEE—

Facts necessary to justify recovery in action for false representations in sale of wife's real estate by husband—Wife bound by husband's representations and acts, when. See *Gleason v. Bell*, 268.

Action to recover purchase price of realty, held in escrow, prematurely brought, when. See *Strauss v. Stern*, 401.

Erection of apartment or terrace does not violate "residence" clause in deed, when. See *Geist v. Ehrich*, 419.

## GUARDRAILS—

It is the duty of a railroad to maintain substantial guardrails on bridge over undercut, when. See *Railway Co. v. Helber*, 231.

## Habeas Corpus—Impeachment.

## HABEAS CORPUS—

One convicted for illegal sale of cocaine, under Section 12672, General Code, cannot raise question of validity of Section 7388-6, Revised Statutes, providing indeterminate sentence, by *habeas corpus*. See *In re Allen*, 315.

Criminal law—Conviction for burglary—Indeterminate sentence to penitentiary—Claim of illegal detention—Application for *habeas corpus*—Sentence erroneous but not void, when—Sections 2166, 12374, 12438 and 13767, General Code. See *In re Winslow*, 328.

The sales-by-weight-or-measure law (Section 6418-1, General Code; 103 O. L., 136) violates Section 1, Article 1, Constitution, and is invalid. See *In re Steube*, 135.

## HOME RULE—

Section 9a, Article 15, Constitution, relating to home rule on intoxicating liquors, was regularly and legally initiated, submitted and carried in 1914—Validity of amendment. See *Hockett v. Licensing Board*, 176.

## HUSBAND AND WIFE—

A wife is bound by false representations made by husband in selling her real estate, when. See *Gleason v. Bell*, 268.

Jurisdiction to grant alimony where divorce granted adverse party. See *Boling v. Boling*, 390.

## HYPOTHETICAL QUESTIONS—

Criminal law—Murder—Evidence—Impeachment—Testimony of physicians—Rebuttal—Admission and competency of evidence—Expert witnesses—Hypothetical question—Charge to jury—Preponderance of evidence. See *Hoover v. State*, 41.

## ILLEGAL VOTES—

Election not invalidated because polls kept open after statutory closing time, in absence of fraud and illegal votes, when. See *In re Chagrin Falls*, 308.

## IMPEACHMENT—

Criminal law—Murder—Evidence—Impeachment—Testimony of physicians—Rebuttal—Admission and competency of evidence—Expert witnesses—Hypothetical question—Charge to jury—Preponderance of evidence. See *Hoover v. State*, 41.

## Impeachment—Indictment.

## IMPEACHMENT—Continued.

Pleadings are admissible in evidence to prove admissions or impeach statements, when. See *Railway Co. v. Helber*, 231.

## IMPLIED CONTRACTS—

No implied contract to pay for services rendered by member of family and mutuality of contract necessary, when—Written or parol contracts—Degree of proof where defendant a living person or a personal representative. See *Merrick v. Ditzler*, 256.

## IMPROVEMENT—

Under Section 2416, General Code, county commissioners may compound or release claim for damages against road contractor for breach of contract, when—*Pro tanto* pay may be allowed or rejected upon abandonment of contract, when—Contract of settlement cannot be rescinded, when. See *State, ex rel. Jewett, v. Sayre*, 85.

## INDETERMINATE SENTENCE—

One convicted for illegal sale of cocaine, under Section 12672, General Code, cannot raise question of validity of Section 7388-6, Revised Statutes, providing indeterminate sentence, by *habeas corpus*. See *In re Allen*, 315.

Conviction for burglary—Indeterminate sentence to penitentiary—Claim of illegal detention—Application for *habeas corpus*—Sentence erroneous but not void, when—Sections 2166, 12374, 12438 and 13767, General Code. See *In re Winslow*, 328.

## INDICTMENT—

Joint indictment—Nollied against one defendant—Discharge claimed by remaining defendant—Offense joint and several—Sections 12472, 12473 and 12474, General Code—Embezzling or misapplying bank funds—Section 44, Thomas banking act. See *State v. Keith*, 132.

Rape—Variance between indictment and proof—Different transactions—Election by state—Date of offense—Evidence of act—Intercourse with others—Venereal disease—Physical examination of accused. See *Angeloff v. State*, 361.

## Initiative and Referendum—Instructions to Jury.

## INITIATIVE AND REFERENDUM—

The constitution and statutes provide a means for adoption or rejection of constitutional amendments—Section 9a, Article 15, relating to home rule on intoxicating liquors, legally submitted and adopted—Validity of amendment. See *Hockett v. Licensing Board*, 176.

## INSOLVENCY—

Receivership—Creditors' committee—Assignment of claims by creditors—Interagreement by two stockholders—Stockholder's liability—Purchase of claims by one stockholder—Accounting in action to enforce liability—Remedies. See *Jones v. Turney & Jones Co.*, 122.

## INSOLVENCY COURT—

Jurisdiction to grant alimony where divorce granted adverse party. See *Boling v. Boling*, 390.

## INSPECTION OF OILS—

Ohio oil-inspection act affecting interstate commerce contravenes clause 2, Section 10, Article 1, U. S. Constitution, and is unconstitutional because imposing fees in excess of necessary inspection expenses. See *Castle v. Mason*, 296.

## INSTRUCTIONS TO JURY—

Criminal law—Murder—Evidence—Impeachment—Testimony of physicians—Rebuttal—Admission and competency of evidence—Expert witnesses—Hypothetical questions—Charge to jury—Preponderance of evidence. See *Haover v. State*, 41.

Malpractice—Physician—Expert testimony—Degree of skill required—Charge to jury. See *Hier v. Stites*, 127.

It is the duty of the trial court to charge the jury at the time evidence of other similar offenses is offered, when. See *Baxter v. State*, 167.

It is error for court to explain legal effect of answer to special finding of fact, under Section 11463, General Code, or instruct jury as to harmonizing special and general verdicts, when. See *Walsh v. Thomas Sons*, 210.

Instructions to jury as to returning verdict by three-fourths of members, under Section 11455, General Code (103 O. L., 11),

## Instructions to Jury—Interest.

## INSTRUCTIONS TO JURY—Continued.

erroneous, but not prejudicial if verdict unanimous, when. See *Railway Co. v. Helber*, 246.

Error to omit to charge jury that contributory negligence defeats recovery, when. See *Klein v. Goldstein*, 388.

Error to charge jury to consider only evidence that appeals to sense of justice and fairness. See *Fox v. Jewell*, 409.

Error to charge jury as to measure of damages where same fixed by terms of contract, when. See *Crites v. Pillmore-Anderegg Co.*, 412.

## INSURANCE—

Death from dilation of heart caused by cold plunge bath not within terms of accident insurance policy, when. See *Casualty Co. v. Johnson*, 155.

Insurance agent selling corporation stock under an *alias* and embezzling proceeds is estopped to deny agency, when—Questions of agency and time of forming criminal intent are jury questions, when. See *State v. Gross*, 161.

Time for recuperation included in total-disability period, when. See *Amer. Assur. Co. v. Dickson*, 380.

## INTENT—

Questions of agency and time of forming criminal intent in embezzlement are jury questions and it is error to direct verdict, when. See *State v. Gross*, 161.

## INTENTION—

Whether gift to legatee, subsequent to date of will, is an ademption depends upon testator's intention—Gift will be presumed an ademption of legacy *pro tanto* where made to child or one *in loco parentis* in absence of expressed intention or extrinsic evidence, when. See *Ellard, Exr., v. Ferris, Exr.*, 339.

## INTEREST—

County commissioners cannot refuse to award county funds to bank offering highest interest, under Section 2717, General Code, because sureties named in proposal for inactive deposits are same as for active deposits, when. See *Commissioners v. State, ex rel.*, 145.

Interest on amount of default, covered by surety bond, computed, how. See *Surety Co. v. State*, 392.

## Interest and Sinking Fund—Interpretation of Constitution.

## INTEREST AND SINKING FUND—

The amendment of Section 5649-2, General Code (108 O. L., 552), relating to interest and sinking fund, merely eliminates parts of the original section, and the words "heretofore" and "hereafter" refer to June 2, 1911. See *State, ex rel. Durr, v. Spiegel*, 13.

The act authorizing levy for interest and sinking funds (108 O. L., 112), to redeem Cincinnati Southern Railway terminal facility and betterment bonds (102 O. L., 111), conforms to Section 11, Article 12, Constitution. See *Cincinnati v. Harris*, 151.

## INTERPRETATION OF CONSTITUTION—

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Authority conferred upon common pleas court to establish conservancy districts and provisions for organization and membership of districts (104 O. L., 13) constitutional—Reasons for declaring act an emergency measure, under Section 1d, Article 2, Constitution (1912), valid. See *Snyder v. Deeds*, 407.

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Where an amendatory act contains provisions of original section and original statute is repealed (Section 16, Article 2, Constitution), such provisions are regarded as continuous and undisturbed, when. See *In re Allen*, 315.

Constitutional law—Conflict of judgment of court of appeals with circuit court—Writ of *certiorari*—Section 6, Article 4, Constitution (1912). See *McLarren v. Johnson*, 103.

Section 6828-6, General Code (104 O. L., 16), authorizing appeal from refusal of common pleas court to establish conservancy district, repugnant to Section 6, Article 4, Constitution (1912). See *Snyder v. Deeds*, 407.

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## Interpretation of Constitution—Interpretation of Statutes.

## INTERPRETATION OF CONSTITUTION—Continued.

Section 11, Article 12, Constitution. See *Cincinnati v. Harris*, 151.

Section 1, Article 18, Constitution (1912), relating to classification of municipalities, is not self-executing—Sections 3497, 3498 and 3499, General Code, regulating transition from one class to another, not inconsistent with said section—Federal census controls, when. See *Murray v. State, ex rel. Nestor*, 220.

Constitutionality of a law determined by operative effect, when—Inspection of oils, etc., lawful exercise of police power—Ohio oil-inspection act affecting interstate commerce contravenes clause 2, Section 10, Article 1, U. S. Constitution, and is unconstitutional because imposing fees in excess of necessary inspection expenses. See *Castle v. Mason*, 296.

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Criminal law—Joint indictment—Nolled against one defendant—Discharge claimed by remaining defendant—Offense joint and several—Sections 12472, 12473 and 12474, General Code—Embezzling or misapplying bank funds—Section 44, Thomas banking act. See *State v. Keith*, 132.

Officers of bank organized under free-banking act (49 O. L., 41) may be guilty of embezzlement under Section 12474, General Code, when. See *State v. Barkman*, 248.

Amended Section 12672, General Code, providing penitentiary sentence upon second conviction for illegal sale of cocaine, is not *ex post facto* or retroactive, when—*Habeas corpus*—Constitutionality of indeterminate-sentence law. See *In re Allen*, 315.

Criminal law—Embezzlement—Public moneys loaned to bank—Aider and abettor—Knowledge—Sections 12873, 12874 and 13674, General Code. See *State v. Cameron et al.*, 50.

Bill of exceptions by prosecuting attorney or attorney general in criminal case, under Section 13681, General Code, must be filed within forty days after rendition of judgment, when. See *State v. Cox*, 141.

Section 15150-4, General Code (103 O. L., 112), authorizing levy for interest and sinking funds to redeem Cincinnati Southern Railway terminal facility and betterment bonds (102 O. L., 111), conforms to Section 11, Article 12, Constitution. See *Cincinnati v. Harris*, 151.

## Interstate Commerce—Jurisdiction.

## INTERSTATE COMMERCE—

Ohio oil-inspection act affecting interstate commerce contravenes clause 2, Section 10, Article 1, U. S. Constitution, and is unconstitutional because imposing fees in excess of necessary inspection expenses. See *Castle v. Mason*, 296.

## INTOXICATING LIQUORS—

Election to prohibit sale of intoxicating liquors not invalidated because polls kept open after statutory closing hours, when. See *In re Chagrin Falls*, 308.

Section 9a, Article 15, Constitution, relating to home rule on intoxicating liquors, was regularly and legally initiated, submitted and carried in 1914—Validity of amendment. See *Hockett v. Licensing Board*, 176.

## JOINT INDICTMENT—

Nollied against one defendant—Discharge claimed by remaining defendant—Offense joint and several—Sections 12472, 12473 and 12474, General Code—Embezzling or misapplying bank funds—Section 44, Thomas banking act. See *State v. Keith*, 132.

## JUDGES—

In a primary election a voter affiliated with one party cannot become the judicial candidate of another party. See *State, ex rel. Murphy, v. Graves*, 36.

Mandamus does not lie to compel judge to sign bill of exceptions taken on trial before referee, when; the record without a bill presents all questions to appellate court, when. See *State, ex rel. Klorer, v. Fimple*, 99.

## JUDGMENT—

Judgment of court refusing to amend return of service of summons is final and cannot be relitigated in collateral suit, when. See *Paulin v. Sparrow*, 279.

## JURISDICTION—

1. *Lawful exercise presumed*—Where it does not otherwise affirmatively appear from the record, it will be presumed that a court of general jurisdiction regularly acquired and lawfully

## Jurisdiction.

## JURISDICTION—Continued.

exercised its jurisdiction over the parties. *Paulin v. Sparrow*, 279.

2. *Service of summons—Defective return—Jurisdiction of parties not defeated, when*—Where a defendant has been duly and legally served with summons, a defective return by the officer making the service does not defeat the jurisdiction of the court over the person of a defendant legally served with process. *Ib.*

3. *Court may order return amended, when*—A court has the authority to order the return of process amended in accordance with the facts relating to such service either before judgment or at any time after judgment that the evidence is available to establish the facts upon which the judgment of the court ordering the return amended is predicated. *Ib.*

4. *Judgment as to amendment final, when*—Where a defendant seeks to amend the return of the officer serving the process by striking out certain matters and things stated therein in relation to the service thereof, and the court upon the evidence offered finds against the defendant and refuses to order the amendment, such judgment is final and conclusive upon the defendant until reversed, vacated or set aside by a court of competent jurisdiction, and the defendant cannot introduce evidence upon that issue or relitigate that question in a collateral suit. *Ib.*

Public utilities commission, acting under Section 614-51, General Code, may relieve street railway company from municipal ordinance directing extension of lines, and its order will not be reversed by supreme court, when. See *Cincinnati v. Commission*, 331.

Jurisdiction to grant alimony where divorce granted adverse party. See *Boling v. Boling*, 390.

Authority conferred on common pleas courts to establish conservancy districts and provisions for organization and membership of districts (104 O. L., 13), constitutional—Section 6828-6, General Code (104 O. L., 16), authorizing appeal from refusal to establish conservancy districts, repugnant to Section 6, Article 4, Constitution (1912). See *Snyder v. Deeds*, 407.

Court of appeals does not acquire jurisdiction in absence of final order, when. See *Arbuckle v. Belting Co.*, 415.

**Jury.****JURY—**

*Special findings—Section 11463, General Code—Error for court to explain, when—General and special verdicts—*Upon submission by the court, of a request for a special finding upon a particular question of fact under Section 11463, General Code, it is error for the court to explain to the jury the legal effect of the answer thereto, or to give any instruction, explanation or suggestion that seeks to harmonize the answer with the general verdict or with other special findings submitted for determination. *Walsh v. Thomas' Sons*, 210.

*Criminal law—Murder—Evidence—Impeachment—Testimony of physicians—Rebuttal—Admission and competency of evidence—Expert witnesses—Hypothetical question—Charge to jury—Preponderance of evidence.* See *Hoover v. State*, 41.

*Malpractice—Physician—Expert testimony—Degree of skill required—Charge to jury.* See *Hier v. Stites*, 127.

*Questions of agency and time of forming criminal intent in embezzlement are jury questions and it is error to direct verdict, when.* See *State v. Gross*, 161.

*It is the duty of the trial court to charge the jury at the time evidence of other similar offenses is offered, when.* See *Baxter v. State*, 167.

*Duty of court where counsel in argument to jury comment on special findings of fact.* See *Walsh v. Thomas' Sons*, 210.

*Jury is entitled to pleadings during deliberations, but pleadings are not admissible in evidence, when.* See *Railway Co. v. Helber*, 231.

*Instructions to jury as to returning verdict by three-fourths of members, under Section 11455, General Code (103 O. L., 11), erroneous, but not prejudicial if verdict unanimous, when.* See *Railway Co. v. Helber*, 246.

*Apportionment of cost of grade-crossing elimination as fixed by ordinance and verdict of jury.* See *Traction Co. v. Akron*, 382.

*Error to omit to charge jury that contributory negligence defeats recovery, when.* See *Klein v. Goldstein*, 388.

*Error to charge jury to consider only evidence that appeals to sense of justice and fairness.* See *Fox v. Jewell*, 409.

*Error to charge jury as to measure of damages where same fixed by terms of contract, when.* See *Crites v. Pillmore-Anderegg Co.*, 412.

## Jury—Lessor and Lessee.

## JURY—Continued.

Whether one who had alighted from car and was assaulted by employe was a passenger, question for jury, when. See *Gill v. Ry. & Lt. Co.*, 435.

## LAND TITLES—

Entry and occupation of land by the state—Act of February 4, 1825 (23 O. L., 56)—In construction of canals, was an appropriation and entitled owners to compensation, when—Fee-simple title in state, when—No adverse possession against state, when—Act of congress of May 24, 1828 (4 Stats. at Large, 306), operated as a present grant to state—Selection and use of lands vested fee-simple title in state as against federal government, when. See *Haynes v. Jones*, 197.

## LEASES—

Lessor and lessee—Rights and liabilities of lessee and his assignee for rents—Section 12206, General Code—Sureties—Oil lease—Liability of assignee for royalties. See *Gas Co. v. Oil Co.*, 85.

## LEGACY—

Whether gift to legatee, subsequent to date of will, is an ademption depends upon testator's intention—Gift will be presumed an ademption of legacy *pro tanto* where made to child or one *in loco parentis*, when. See *Ellard, Exr., v. Ferris, Exr.*, 339.

## LEGAL ADVERTISING—

Publication of municipal ordinances in one newspaper is a compliance with Section 4227 *et seq.*, General Code, when. See *Elmwood Place v. Schansle*, 354.

## LEGATEES—

Issue of deceased legatee entitled to legacy bequeathed to parents, when. See *Bigham v. Harlan*, 440.

## LESSOR AND LESSEE—

Rights and liabilities of lessee and his assignee for rents—Section 12206, General Code—Sureties—Oil lease—Liability of assignee for royalties. See *Gas Co. v. Oil Co.*, 85.



## Liability—Majority Vote.

## LIABILITY—

Receivership—Creditors' committee—Assignment of claims by creditors—Interagreement by two stockholders—Stockholder's liability—Purchase of claims by one stockholder—Accounting in action to enforce liability—Remedies. See *Jones v. Turney & Jones Co.*, 122.

## LICKING RESERVOIR—

Entry and occupation of land by the state—Act of February 4, 1825 (23 O. L., 56)—In construction of canals, was an appropriation and entitled owners to compensation, when—Fee-simple title in state, when—No adverse possession against state, when—Act of congress of May 24, 1828 (4 Stats. at Large, 306), operated as a present grant to state—Selection and use of lands vested fee-simple title in state as against federal government, when. See *Haynes v. Jones*, 197.

## LIENS—

Rights of purchasers of certificates of stock given as collateral and sold by bank upon default, as against attachment and garnishment. See *Bergin v. McCabe*, 427.

## LIMITATION OF TAXES—

The amendment of Section 5649-2, General Code (103 O. L., 552), merely eliminates parts of the original section, and the words "heretofore" and "hereafter" refer to June 2, 1911. See *State, ex rel. Durr, v. Spiegel*, 13.

## LIQUOR LAWS—

Section 9a, Article 15, Constitution, relating to home rule on intoxicating liquors, was regularly and legally initiated, submitted and carried in 1914—Validity of amendment. See *Hockett v. Licensing Board*, 176.

Election to prohibit sale of intoxicating liquors not invalidated because polls kept open after statutory closing hours, when. See *In re Chagrin Falls*, 308.

## MAJORITY VOTE—

Where question of issuing municipal bonds is submitted, under Section 3939 *et seq.*, General Code, in determining two-thirds vote, under Section 3947, General Code, blank and unim-

**Majority Vote—Misconduct of Counsel.****MAJORITY VOTE—Continued.**

telligible ballots not counted—Where majority or proportionate vote is necessary to determine result, blank and unintelligible ballots considered, when. See *Wellsville v. Connor*, 28.

**MALPRACTICE—**

Physician—Expert testimony—Degree of skill required—Charge to jury. See *Hier v. Stites*, 127.

**MANDAMUS—**

Mandamus does not lie to compel judge to sign bill of exceptions taken on trial before referee, when; the record without a bill presents all questions to appellate court, when. See *State, ex rel. Klorer, v. Fimple*, 99.

Mandamus does not lie to compel secretary of state to recount or direct recount of ballots cast on constitutional amendments and preserved under Section 5090-1, General Code (103 O. L., 265). See *State, ex rel., v. Graves, etc.*, 113.

**MEASURE OF DAMAGES—**

Error to charge jury as to measure of damages where same fixed by terms of contract, when. See *Crites v. Pillmore-Anderegg Co.*, 412.

**MISAPPLICATION OF FUNDS—**

Criminal law—Joint indictment—Nollied against one defendant—Discharge claimed by remaining defendant—Offense joint and several—Sections 12472, 12473 and 12474, General Code—Embezzling or misapplying bank funds—Section 44, Thomas banking act. See *State v. Keith*, 132.

Officers of bank organized under free-banking act (49 O. L., 41) may be guilty of embezzlement under Section 12474, General Code, when. See *State v. Barkman*, 248.

**MISCONDUCT OF COUNSEL—**

Altercations between counsel, side remarks and comment on evidence should not be tolerated by a trial judge. See *Baxter v. State*, 167.

Duty of court where counsel in argument to jury comment on special findings of fact. See *Walsh v. Thomas' Sons*, 210.

## Municipal Bonds—Municipal Corporations.

## MUNICIPAL BONDS—

The amendment of Section 5649-2, General Code (103 O. L., 552), relating to interest and sinking fund, merely eliminates parts of original section, and the words "heretofore" and "hereafter" refer to June 2, 1911. See *State, ex rel. Durr, v. Spiegel*, 13.

Where question of issuing municipal bonds is submitted, under Section 3939 *et seq.*, General Code, in determining two-thirds vote, under Section 3947, General Code, blank and unintelligible ballots not considered, when. See *Wellsville v. Connor*, 28.

## MUNICIPAL CORPORATIONS—

1. *Classification*—Section 1, Article 18, Constitution (1912), not self-executing—Section 1 of Article 18 of the Constitution, relating to the classification of municipal corporations, adopted September 3, 1912, is not self-executing. *Murray v. State, ex rel. Nestor*, 220.

2. *Transition from one class to another*—Sections 3497, 3498 and 3499, General Code, constitutional—Sections 3497, 3498 and 3499, General Code, regulate the method of transition of municipal corporations from one class to the other and are not inconsistent with that constitutional provision. *Ib.*

3. *Federal census controls, when*—A municipal corporation which had a population of less than five thousand at the last federal census did not advance to a city when it was made to appear by an official census taken by the municipal corporation subsequently thereto that it had a population of more than five thousand. *Ib.*

The amendment of Section 5649-2, General Code (103 O. L., 552), relating to interest and sinking fund, merely eliminates parts of original section, and the words "heretofore" and "hereafter" refer to June 2, 1911. See *State, ex rel. Durr, v. Spiegel*, 13.

Where question of issuing municipal bonds is submitted, under Section 3939 *et seq.*, General Code, in determining two-thirds vote, under Section 3947, General Code, blank and unintelligible ballots not considered, when. See *Wellsville v. Connor*, 28.

Ordinance granting franchise for furnishing water supply—Section 3982, General Code—Public utility rates—Section 614-44, General Code—Referendum—Section 4227-2, General Code—Municipality liable, when. See *State, ex rel., v. Burris, Treas.*, 70.

## Municipal Corporations—Negligence.

## MUNICIPAL CORPORATIONS—Continued.

Sections 1465-62 to 1465-67, General Code (103 O. L., 72), relating to workmen's compensation for state, county, city and township employes, are constitutional. See *Porter et al. v. Hopkins*, 74.

The act authorizing levy for interest and sinking funds (103 O. L., 112), to redeem Cincinnati Southern Railway terminal facility and betterment bonds (102 O. L., 111), conforms to Section 11, Article 12, Constitution. See *Cincinnati v. Harris*, 151.

Public utilities commission, acting under Section 614-51, General Code, may relieve street railway company from municipal ordinance directing extension of lines, and its order will not be reversed by supreme court, when. See *Cincinnati v. Commission*, 331.

Publication of municipal ordinances and resolutions in one newspaper is a compliance with Section 4227 *et seq.*, General Code, when. See *Elmwood Place v. Schansle*, 354.

Apportionment of cost of grade-crossing elimination as fixed by ordinance and verdict of jury. See *Traction Co. v. Akron*, 382.

## MURDER—

Criminal law—Murder—Evidence—Impeachment—Testimony of physicians—Rebuttal—Admission and competency of evidence—Expert witnesses—Hypothetical question—Charge to jury—Preponderance of evidence. See *Hoover v. State*, 41.

## NAMES—

Insurance agent selling corporate stock under an *alias* and embezzling proceeds is estopped to deny agency, when. See *State v. Gross*, 161.

A partnership operating under fictitious name may commence action under Section 8104, General Code, without alleging compliance with registration act, but noncompliance will defeat action unless compliance under Section 8099, General Code, when. See *Walsh v. Thomas' Sons*, 210.

## NEGLECT—

Where two causes combine to produce injury to one crossing bridge, liability determined by duty to maintain bridge, when—Duty of railroad to maintain substantial guardrails on bridge over undercut, when. See *Railway Co. v. Helber*, 231.

## Negligence—Notice.

## NEGLIGENCE—Continued.

Error to omit to charge jury that contributory negligence defeats recovery, when. See *Klein v. Goldstein*, 388.

Whether one who had alighted from car and was assaulted by employe was a passenger, jury question, when. See *Gill v. Ry. & Lt. Co.*, 435.

## NEGOTIABLE INSTRUMENTS—

Order by contractor to material man not an unconditional order or acceptance, under Section 8231, General Code, when. See *Rigby v. Palmer Co.*, 371.

Services rendered during lifetime sufficient consideration for promissory note, when. See *Grindle v. Missionary Assn.*, 374.

## NEXT OF KIN—

Property is nonancestral, descends under Section 8574, General Code, and whole-blood heirs preferred, when. See *Schroth, Admr., v. Noble*, 438.

## NOMINATIONS—

In a primary election a voter affiliated with one party cannot become the candidate of another party. See *State, ex rel. Murphy, v. Graves*, 36.

Objections to nomination of candidates will not be ordered heard and determined unless filed within proper time, when. See *State, ex rel. Scott, v. Swan*, 61.

## NONANCESTRAL PROPERTY—

Property is nonancestral, descends under Section 8574, General Code, and whole-blood heirs preferred, when. See *Schroth, Admr., v. Noble*, 438.

## NOTES—

Services rendered during lifetime sufficient consideration for promissory note, when. See *Grindle v. Missionary Assn.*, 374.

## NOTICE—

Workmen's compensation—Filing first notice and preliminary application bars action against employer, when—Sections 1465-61 and 1465-44, General Code. See *Zilch v. Bomgardner*, 205.

## Office and Officer.

## OFFICE AND OFFICER—

Amended Section 5649-3b, General Code (103 O. L., 552, and 104 O. L., 287), designating who shall constitute county budget commission, is unconstitutional and void—County official duties must be performed by county officials—Where an act providing substitute and repealing an existing law is declared unconstitutional, the repealing clause is invalid. See *State, ex rel. Pogue, v. Groom*, 1.

The act of February 4, 1913 (103 O. L., 10), amending Section 1500, General Code, by providing for appointment of clerk of supreme court, is constitutional. See *State, ex rel. McKean, v. Graves*, 23.

Criminal law—Embezzlement—Public moneys loaned to bank—Aider and abettor—Knowledge—Sections 12873, 12874 and 13674, General Code. See *State v. Cameron et al.*, 50.

Objections to nomination of candidates will not be ordered heard and determined unless filed within proper time, when. See *State, ex rel. Scott, v. Swan*, 61.

Under Section 2416, General Code, county commissioners may compound or release claim for damages against road contractor for breach of contract, when—*Pro tanto* pay may be allowed or rejected upon abandonment of contract, when—Contract of settlement cannot be rescinded, when. See *State, ex rel. Jewett, v. Sayre*, 85.

Mandamus does not lie to compel secretary of state to recount or direct recount of ballots cast on constitutional amendments and preserved under Section 5090-1, General Code (103 O. L., 265). See *State, ex rel., v. Graves, etc.*, 113.

County commissioners cannot refuse to award county funds to bank offering highest interest, under Section 2717, General Code, because sureties named in proposal for inactive deposits are same as for active deposits, when. See *Commissioners v. State, ex rel.*, 145.

Public utilities commission, acting under Section 614-51, General Code, may relieve street railway company from municipal ordinance directing extension of lines, and its order will not be reversed by supreme court, when. See *Cincinnati v. Commission*, 331.

County treasurer entitled to receive what per cent. of delinquent personal-tax penalties collected. See *Surety Co. v. State, ex rel.*, 421.

## Oil Inspection—Ordinances.

## OIL INSPECTION—

1. *Operative effect of law determinative, when*—The constitutionality of a law may be determined by its operative effect, though on its face it may be apparently valid. *Castle v. Mason*, 296.
2. *Oil inspection lawful exercise of police power, when*—The state has full power to enact proper laws for the inspection of oils, gasoline, petroleum-ether and like substances; and legislation relating to such inspection, if otherwise valid, is not void as an unlawful exercise of its police power. *Ib.*
3. *Ohio inspection act unconstitutional—Clause 2, Section 10, Article 1, U. S. Constitution—Interstate commerce*—The Ohio inspection act, in so far as the same affects interstate commerce, contravenes clause 2, Section 10, Article 1 of the Federal Constitution and is unconstitutional and void for the reason that it imposes a burden on such commerce, by way of fees, largely in excess of the expenses necessary for executing the inspection law. *Ib.*

## OIL LEASES—

Lessor and lessee—Rights and liabilities of lessee and his assignee for rents—Section 12206, General Code—Sureties—Oil lease—Liability of assignee for royalties. See *Gas Co. v. Oil Co.*, 35.

## OPENING POLLS—

Statutory provision fixing time for opening and closing polls is directory—Election not invalidated because polls kept open after statutory closing time, when. See *In re Chagrin Falls*, 308.

## ORDER—

Order by contractor to material man not an unconditional order or acceptance, under Section 8231, General Code, when. See *Rigby v. Palmer Co.*, 371.

## ORDINANCES—

*Municipal ordinances—Publication in one newspaper sufficient, when—Section 4227 et seq., General Code*—In a municipality in which there is only one newspaper published and of general circulation, the publication in that paper of ordinances of a general nature, in the manner and for the period required by

## Ordinances—Partnerships.

## ORDINANCES—Continued.

Section 4227 *et seq.*, General Code, is a compliance with the requirements of those sections. *Elmwood Place v. Schansle*, 354.

Public utilities commission, acting under Section 614-51, General Code, may relieve street railway company from municipal ordinance directing extension of lines, and its order will not be reversed by supreme court, when. See *Cincinnati v. Commission*, 331.

Apportionment of cost of grade-crossing elimination as fixed by ordinance and verdict of jury. See *Traction Co. v. Akron*, 382.

## PARENT AND CHILD—

No implied contract to pay for services rendered by member of family, and mutuality of contract necessary, when—Written or parol contracts—Degree of proof where defendant a living person or a personal representative. See *Merrick v. Ditzler*, 256.

Whether gift to legatee, subsequent to date of will, is an ademption depends upon testator's intention—Gift will be presumed an ademption of legacy *pro tanto* where made to child or one *in loco parentis*, when. See *Ellard, Exr., v. Ferris, Exr.*, 339.

## PAROL CONTRACTS—

A contract to pay for services rendered by member of family may be written or parol and proven by direct or indirect evidence; degree of proof to establish contract. See *Merrick v. Ditzler*, 256.

## PARTIES—

Jurisdiction over parties presumed, when—Defective return of service will not defeat jurisdiction, when—Return of service may be amended before or after judgment, when—Judgment refusing to amend return is final and cannot be relitigated, when. See *Paulin v. Sparrow*, 279.

## PARTNERSHIPS—

*Fictitious names—Right to maintain action—Section 8104, General Code—Pleading—Noncompliance with Section 8099, General Code—Constitutes defense and defeats action, when—A part-*



## Partnerships—Physician and Patient.

## PARTNERSHIPS—Continued.

nership, doing business under a fictitious name, may commence or maintain an action under Section 8104, General Code, without alleging compliance with the act requiring registration; noncompliance may be shown as a defense and will defeat the action unless compliance with Section 8099, General Code, be made during its progress. *Walsh v. Thomas' Sons*, 210.

## PARTY CANDIDATES—

In a primary election a voter affiliated with one party cannot become the candidate of another party. See *State, ex rel. Murphy, v. Graves*, 36.

## PASSENGER—

Whether one who had alighted from car and was assaulted by employe was a passenger, jury question, when. See *Gill v. Ry. & Lt. Co.*, 495.

## PENALTIES—

County treasurer entitled to receive what per cent. of delinquent personal-tax penalties collected. See *Surety Co. v. State, ex rel.*, 421.

## PERSONAL PROPERTY—

County treasurer entitled to receive what per cent. of delinquent personal-tax penalties collected. See *Surety Co. v. State, ex rel.*, 421.

The sales-by-weight-or-measure act (103 O. L., 136), violates Section 1, Article 1, Constitution, and is invalid. See *In re Steube*, 135.

## PHYSICIAN AND PATIENT—

Criminal law—Murder—Evidence—Impeachment—Testimony of physicians—Rebuttal—Admission and competency of evidence—Expert witnesses—Hypothetical question—Charge to jury—Preponderance of evidence. See *Hoover v. State*, 41.

Malpractice—Physician—Expert testimony—Degree of skill required—Charge to jury. See *Hier v. Stites*, 127.

Criminal law—Rape—Variance between indictment and proof—Different transactions—Election by state—Date of offense—Evidence of act—Intercourse with others—Venereal disease—Physical examination of accused. See *Angeloff v. State*, 361.

## Pleading—Prescription.

## PLEADING—

*Jury entitled to pleadings, when—Pleadings as evidence—May be used by adverse party, when—*It is proper for a court to send the pleadings in a cause to the jury during its deliberations, but the pleading of a party is not admissible in evidence on the trial to prove its allegations. A pleading of one party may be introduced by his adversary to prove admissions or to impeach statements made on the trial. *Railway Co. v. Helber*, 281.

*In an action on account by a member of unlawful combination, under Section 6391, General Code, a defendant injured in his business may set up damages allowed by Section 6397, General Code, as counterclaim or set-off. See Guyton v. Eastern Elec. Co.*, 106.

*Incapacity of partnership, doing business under fictitious name, to maintain action, cannot be raised by demurrer, when. See Walsh v. Thomas' Sons*, 210.

*A partnership operating under fictitious name may commence action under Section 8104, General Code, without alleging compliance with registration act, but noncompliance is a defense and will defeat action unless compliance under Section 8099, General Code, when. See Walsh v. Thomas' Sons*, 210.

*In action for damages for false representations in sale of real estate, averment that vendor knew representations to be false unnecessary, when. See Gleason v. Bell*, 268.

## POLLS—

*Statutory provision fixing time for opening and closing polls is directory—Election not invalidated because polls kept open after statutory closing time, when. See In re Chagrin Falls*, 308.

## PRELIMINARY APPLICATION—

*Workmen's compensation—Filing first notice and preliminary application bars action against employer, when—Sections 1465-61 and 1465-44, General Code. See Zilch v. Bomgardner*, 205.

## PRESCRIPTION—

*No adverse possession can divest state of title in canal lands, when. See Haynes v. Jones*, 197.

## Presumptions—Principal and Surety.

## PRESUMPTIONS—

Whether gift to legatee, subsequent to date of will, is an ademption depends upon testator's intention—Gift will be presumed an ademption of legacy *pro tanto* where made to child or one *in loco parentis* in absence of expressed intention or extrinsic evidence, when. See *Ellard, Exr., v. Ferris, Exr.*, 339.

## PRIMARIES—

In a primary election a voter affiliated with one party cannot become the candidate of another party. See *State, ex rel. Murphy, v. Graves*, 36.

Objections to nomination of candidates will not be ordered heard and determined unless filed within proper time, when. See *State, ex rel. Scott, v. Swan*, 61.

## PRINCIPAL AND AGENT—

Principal of estoppel in agency may be invoked in criminal cases, when—Insurance agent selling corporation stock under an *alias* and embezzling proceeds is estopped to deny agency, when—Questions of agency and time of forming criminal intent are jury questions, when. See *State v. Gross*, 161.

A wife is bound by false representations made by husband in selling her real estate, when. See *Gleason v. Bell*, 268.

## PRINCIPAL AND SURETY—

Lessor and lessee—Rights and liabilities of lessee and his assignee for rents—Section 12206, General Code—Sureties—Oil lease—Liability of assignee for royalties. See *Gas Co. v. Oil Co.*, 35.

County commissioners cannot refuse to award county funds to bank offering highest interest, under Section 2717, General Code, because sureties named in proposal for inactive deposits are same as for active deposits, when. See *Commissioners v. State, ex rel.*, 145.

Bond to secure building contract not obtained by fraud or concealment nor to compound a felony, when. See *Bittner v. Title Co.*, 369.

Appeal bond signed by codefendant insufficient, when. See *Steele v. Garn*, 381.

Interest on amount of default computed, how. See *Surety Co. v. State*, 392.

## Proceedings in Error—Pro Tanto Pay.

## PROCEEDINGS IN ERROR—

Appeal bond signed by codefendant insufficient, when. See *Steele v. Garn*, 381.

Effect of failure to prepare bill of exceptions or include agreed statement of facts therein. See *Telephone Co. v. Telephone Co.*, 398.

Court of appeals does not acquire jurisdiction in absence of final order, when. See *Arbuckle v. Belting Co.*, 415.

## PROMISSORY NOTES—

Services rendered during lifetime sufficient consideration for promissory note, when. See *Grindle v. Missionary Assn.*, 374.

## PROOF—

Burden and degree of proof where evidence of other similar offenses is competent—Duty of trial court to charge jury at time evidence offered. See *Baxter v. State*, 167.

Pleadings are admissible in evidence to prove admissions or impeach statements, when. See *Railway Co. v. Helber*, 231.

Degree of proof required where defendant a living person or a personal representative, in action by member of family for compensation for services. See *Merrick v. Ditsler*, 256.

Criminal law—Rape—Variance between indictment and proof—  
Different transactions—Election by state—Date of offense—  
Evidence of act—Intercourse with others—Venereal disease—  
Physical examination of accused. See *Angeloff v. State*, 361.

## PROSECUTING ATTORNEY—

Amended Section 5649-3b, General Code (103 O. L., 552, and 104 O. L., 237), designating who shall constitute county budget commission, is unconstitutional and void, and repealing clauses are invalid. See *State, ex rel. Pogue, v. Groom*, 1.

Bill of exceptions by prosecuting attorney or attorney general in criminal case, under Section 13681, General Code, must be filed within forty days after rendition of judgment, when. See *State v. Cox*, 141.

## PRO TANTO PAY—

Under Section 2416, General Code, county commissioners may allow *pro tanto* pay to road contractor who abandons work on ground of impossibility of performance—Contract of settlement and rescission thereof. See *State, ex rel. Jewett, v. Sayre*, 85.

## Proximate Cause—Railroads.

**PROXIMATE CAUSE—**

Where two causes combine to produce injury to one crossing bridge, liability determined by duty to maintain bridge, when—  
Duty of railroad to maintain substantial guardrails on bridge over undercut, when. See *Railway Co. v. Helber*, 231.

**PUBLICATION—**

Publication of municipal ordinances in one newspaper is a compliance with Section 4227 *et seq.*, General Code, when. See *Elmwood Place v. Schansle*, 354.

**PUBLIC MONEYS—**

Criminal law—Embezzlement—Public moneys loaned to bank—Aider and abettor—Knowledge—Sections 12873, 12874 and 13674, General Code. See *State v. Cameron et al.*, 50.

**PUBLIC UTILITIES—**

Municipal corporations—Ordinance granting franchise for furnishing water supply—Section 3982, General Code—Public utility rates—Section 614-44, General Code—Referendum—Section 4227-2, General Code—Municipality liable, when. See *State, ex rel., v. Burris, Treas.*, 70.

Public utilities commission, acting under Section 614-51, General Code, may relieve street railway company from municipal ordinance directing extension of lines, and its order will not be reversed by supreme court, when. See *Cincinnati v. Commission*, 331.

**QUESTION FOR JURY—**

Whether one who had alighted from car and was assaulted by employe was a passenger, question for jury, when. See *Gill v. Ry. & Lt. Co.*, 435.

**QUO WARRANTO—**

*Quo warranto* lies to determine title to membership on county budget commission, when. See *State, ex rel. Pogue, v. Groom*, 1.

**RAILROADS—**

The act authorizing levy for interest and sinking funds (103 O. L., 112), to redeem Cincinnati Southern Railway terminal

## Railroads—Real Property.

## RAILROADS—Continued.

facility and betterment bonds (102 O. L., 111), conforms to Section 11, Article 12, Constitution. See *Cincinnati v. Harris*, 151.

Where two causes combine to produce injury to one crossing bridge, liability determined by duty to maintain bridge, when—Duty of railroad to maintain substantial guardrails on bridge over undercut, when. See *Railway Co. v. Helber*, 231.

Public utilities commission, acting under Section 614-51, General Code, may relieve street railway company from municipal ordinance directing extension of lines, and its order will not be reversed by supreme court, when. See *Cincinnati v. Commission*, 331.

Apportionment of cost of grade-crossing elimination as fixed by ordinance and verdict of jury. See *Traction Co. v. Akron*, 382.

Whether one who had alighted from car and was assaulted by employe was a passenger, jury question, when. See *Gill v. Ry. & Lt. Co.*, 435.

## RAPE—

Variance between indictment and proof—Different transactions—Election by state—Date of offense—Evidence of act—Intercourse with others—Venereal disease—Physical examination of accused. See *Angeloff v. State*, 361.

## REAL PROPERTY—

Entry and occupation of land by the state—Act of February 4, 1825 (23 O. L., 56)—In construction of canals, was an appropriation and entitled owners to compensation, when—Fee-simple title in state, when—No adverse possession against state, when—Act of congress of May 24, 1828 (4 Stats. at Large, 306), operated as a present grant to state—Selection and use of lands vested fee-simple title in state as against federal government, when. See *Haynes v. Jones*, 197.

Facts necessary to justify recovery in action for false representations in sale of wife's real estate by husband; averment of knowledge of false representations unnecessary, when—Wife bound by husband's representations and acts, when. See *Gleason v. Bell*, 268.

Action to recover purchase price of realty, held in escrow, prematurely brought, when. See *Straus v. Stern*, 401.

## Real Property—Referendum.

## REAL PROPERTY—Continued.

Presentation of claim against estate bars specific performance of agreement to convey real estate, when. See *Mignery v. Olmstead*, 416.

Erection of apartment or terrace does not violate "residence" clause in deed, when. See *Geist v. Ehrich*, 419.

Property is nonancestral, descends under Section 8574, General Code, and whole-blood heirs preferred, when. See *Schroth, Admr., v. Noble*, 438.

Issue of deceased legatee entitled to legacy bequeathed to parents, when. See *Bigham v. Harlan*, 440.

## RECEIVERSHIP—

Creditors' committee—Assignment of claims by creditors—Inter-agreement by two stockholders—Stockholder's liability—Purchase of claims by one stockholder—Accounting in action to enforce liability—Remedies. See *Jones v. Turney & Jones Co.*, 122.

## RECOUNT—

Mandamus does not lie to compel secretary of state to recount or direct recount of ballots cast on constitutional amendments and preserved under Section 5090-1, General Code (108 O. L., 265). See *State, ex rel., v. Graves, etc.*, 113.

## REFEREES—

Mandamus does not lie to compel judge to sign bill of exceptions taken on trial before referee, when; the record without a bill presents all questions to appellate court, when. See *State, ex rel. Klorer, v. Fimple*, 99.

## REFERENDUM—

1. *Amendment to constitution—Means provided for adoption or rejection*—The constitution and the statutes of Ohio provide ample and adequate legal machinery for the initiation, submission and adoption or rejection of any proposed amendment to the constitution of Ohio by what is known as a referendum vote. *Hockett v. Licensing Board*, 176.
2. *Home rule as to intoxicating liquors—Section 9a, Article 15, Constitution, regularly adopted*—Article 15, Section 9a, relating to home rule on the subject of intoxicating liquors, was

## Referendum—Remedies.

## REFERENDUM—Continued.

regularly and legally initiated, submitted and carried by a majority of the voters of Ohio voting thereon at the regular election held in November, 1914, and thereby became a part of the constitution of Ohio. *Ib.*

3. *Validity of amendment*—Said amendment is not in conflict with any provision of the federal constitution. *Ib.*

Municipal corporations—Ordinance granting franchise for furnishing water supply—Section 3982, General Code—Public utility rates—Section 614-44, General Code—Referendum—Section 4227-2, General Code—Municipality liable, when. See *State, ex rel., v. Burris, Treas.*, 70.

## REGISTRATION—

A partnership operating under fictitious name may commence action under Section 8104, General Code, without alleging compliance with registration act, but noncompliance is a defense and will defeat action unless compliance under Section 8099, General Code, when. See *Walsh v. Thomas' Sons*, 210.

## REMEDIES—

*Quo warranto* lies to determine title to membership on county budget commission, when. See *State, ex rel. Pogue, v. Groom*, 1.

Objections to nomination of candidates will not be ordered heard and determined unless filed within proper time, when. See *State, ex rel. Scott, v. Swan*, 61.

Mandamus does not lie to compel judge to sign bill of exceptions taken on trial before referee, when; the record without a bill presents all questions to appellate court, when. See *State, ex rel. Klorer, v. Fimple*, 99.

Mandamus does not lie to compel secretary of state to recount or direct recount of ballots cast on constitutional amendments and preserved under Section 5090-1, General Code (103 O. L., 265). See *State, ex rel., v. Graves, etc.*, 113.

Receivership—Creditors' committee—Assignment of claims by creditors—Interagreement by two stockholders—Stockholder's liability—Purchase of claims by one stockholder—Accounting in action to enforce liability—Remedies. See *Jones v. Turney & Jones Co.*, 122.

One convicted for illegal sale of cocaine, under Section 12672, General Code, cannot raise question of validity of Section



**Remedies—Reservoirs.****REMEDIES—Continued.**

7388-6, Revised Statutes, providing indeterminate sentence, by *habeas corpus*. See *In re Allen*, 315.

**RENTS—**

Lessor and lessee—Rights and liabilities of lessee and his assignee for rents—Section 12206, General Code—Sureties—Oil lease—Liability of assignee for royalties. See *Gas Co. v. Oil Co.*, 85.

**REPEALS—**

*Substituted act declared unconstitutional—Repealing clause invalid, when*—Where an act of the general assembly, purporting to provide a substitute for an existing law and in terms repealing the existing law, is declared to be unconstitutional and void, the repealing clause must also be held invalid, unless it clearly appear that the general assembly would have passed the repealing clause regardless of whether it had provided a valid substitute for the act repealed. *State, ex rel. Pogue, v. Groom*, 1.

Where an amendatory act contains entire section as amended and repeals the original statute (Section 16, Article 2, Constitution), the amended section is construed, how—Amended sections considered with entire subject, when—Section 5649-2, General Code, as amended 103 O. L., 552. See *State, ex rel. Durr, v. Spiegel*, 13.

Banks organized under free-banking act (49 O. L., 41) continue body politic until repeal of the act—The Thomas banking act (99 O. L., 269) did not repeal the free-banking act—Embezzlement. See *State v. Barkman*, 248.

Where an amendatory act contains provisions of original section and original statute is repealed (Section 16, Article 2, Constitution), such provisions are regarded as continuous and undisturbed, when. See *In re Allen*, 315.

**RES ADJUDICATA—**

Judgment of court refusing to amend return of service of summons is final and cannot be relitigated in collateral suit, when. See *Paulin v. Sparrow*, 279.

**RESERVOIRS—**

Entry and occupation of land by the state—Act of February 4, 1825 (23 O. L., 56)—In construction of canals, was an appro-

## Reservoirs—Road Improvement.

## RESERVOIRS—Continued.

priation and entitled owners to compensation, when—Fee-simple title in state, when—No adverse possession against state, when—Act of congress of May 24, 1828 (4 Stats. at Large, 306), operated as a present grant to state—Selection and use of lands vested fee-simple title in state as against federal government, when. See *Haynes v. Jones*, 197.

## RESOLUTIONS—

Publication of municipal ordinances and resolutions in one newspaper is a compliance with Section 4227 *et seq.*, General Code, when. See *Elmwood Place v. Schansle*, 354.

## RETROACTIVE LAWS—

Amended Section 12672, General Code, providing penitentiary sentence upon second conviction for illegal sale of cocaine, is not *ex post facto* or retroactive, when—The question of validity of indeterminate-sentence law cannot be raised by *habeas corpus*, when. See *In re Allen*, 315.

## RETURN OF SUMMONS—

Defective return of service will not defeat jurisdiction, when—Return may be amended before or after judgment, when—Judgment of court refusing to amend return is final and cannot be relitigated in collateral suit, when. See *Paulin v. Sparrow*, 279.

## REVENUE—

Ohio oil-inspection act affecting interstate commerce contravenes clause 2, Section 10, Article 1, U. S. Constitution, and is unconstitutional because imposing fees in excess of necessary inspection expenses. See *Castle v. Mason*, 296.

## REVERSALS—

Supreme court will not reverse judgment where court of appeals reversed on weight of evidence, when. See *Bevan v. Board of Foreign Missions*, 395.

## ROAD IMPROVEMENT—

Under Section 2416, General Code, county commissioners may compound or release claim for damages against road contrac-

## Road Improvement—Sentence.

## ROAD IMPROVEMENT—Continued.

tor for breach of contract, when—*Pro tanto* pay may be allowed or rejected upon abandonment of contract, when—Contract of settlement cannot be rescinded, when. See *State, ex rel. Jewett, v. Sayre*, 85.

## ROYALTIES—

Lessor and lessee—Rights and liabilities of lessee and his assignee for rents—Section 12206, General Code—Sureties—Oil lease—Liability of assignee for royalties. See *Gas Co. v. Oil Co.*, 35.

## SALES—

Facts necessary to justify recovery in action for false representations in sale of wife's real estate by husband; averment of knowledge of false representations unnecessary, when—Wife bound by husband's representations and acts, when. See *Gleason v. Bell*, 268.

Action to recover purchase price of realty, held in escrow, prematurely brought, when. See *Straus v. Stern*, 401.

## SALES-BY-WEIGHT LAW—

*Constitutional law—Weights-and-measures act—Section 6418-1, General Code (103 O. L., 136), unconstitutional—Section 1, Article 1, Constitution—Habeas corpus—Section 6418-1, General Code, as amended February 27, 1913 (103 O. L., 136), is repugnant to Section 1, Article 1 of the Constitution of Ohio and is invalid. In re Steube*, 135.

## SECRETARY OF STATE—

Mandamus does not lie to compel secretary of state to recount or direct recount of ballots cast on constitutional amendments and preserved under Section 5090-1, General Code (103 O. L., 265). See *State, ex rel., v. Graves, etc.*, 113.

## SENTENCE—

One convicted for illegal sale of cocaine, under Section 12672, General Code, cannot raise question of validity of Section 7388-6, Revised Statutes, providing indeterminate sentence, by *habeas corpus*. See *In re Allen*, 315.

Criminal law—Conviction for burglary—Indeterminate sentence to penitentiary—Claim of illegal detention—Application for

## Sentence—Sheriff's Return.

## SENTENCE—Continued.

*habeas corpus*—Sentence erroneous but not void, when—Sections 2166, 12374, 12438 and 13767, General Code. See *In re Winslow*, 328.

## SERVICE OF SUMMONS—

Defective return of service will not defeat jurisdiction, when—  
Return may be amended before or after judgment, when—  
Judgment of court refusing to amend return is final and cannot be relitigated in collateral suit, when. See *Paulin v. Sparrow*, 279.

## SERVICES—

No implied contract to pay for services rendered by member of family and mutuality of contract necessary, when—Written or parol contracts—Degree of proof where defendant a living person or a personal representative. See *Merrick v. Ditsler*, 256.

Notes given for services rendered during lifetime are a debt and not a gift, when. See *Grindle v. Missionary Assn.*, 374.

## SET-OFF—

In an action on account by a member of unlawful combination, under Section 6391, General Code, a defendant injured in his business may set up damages allowed by Section 6397, General Code, as counterclaim or set-off. See *Guyton v. Eastern Elec. Co.*, 106.

## SETTLEMENT—

Under Section 2416, General Code, county commissioners may compound or release claim for damages against road contractor for breach of contract, when—*Pro tanto* pay may be allowed or rejected upon abandonment of contract, when—Contract of settlement cannot be rescinded, when. See *State, ex rel. Jewett, v. Sayre*, 85.

## SHERIFF'S RETURN—

Defective return of service will not defeat jurisdiction, when—  
Return may be amended before or after judgment, when—  
Judgment of court refusing to amend return is final and cannot be relitigated in collateral suit, when. See *Paulin v. Sparrow*, 279.

## Similar Offenses—State Lands.

## SIMILAR OFFENSES—

Burden and degree of proof where evidence of other similar offenses is competent—Duty of trial court to charge jury at time evidence offered. See *Baxter v. State*, 167.

## SINKING FUND—

The amendment of Section 5649-2, General Code (103 O. L., 552), relating to interest and sinking fund, merely eliminates parts of the original section, and the words "heretofore" and "hereafter" refer to June 2, 1911. See *State, ex rel. Durr, v. Spiegel*, 13.

The act authorizing levy for interest and sinking funds (103 O. L., 112), to redeem Cincinnati Southern Railway terminal facility and betterment bonds (102 O. L., 111), conforms to Section 11, Article 12, Constitution. See *Cincinnati v. Harris*, 151.

## SKILL—

Malpractice—Physician—Expert testimony—Degree of skill required—Charge to jury. See *Hier v. Stites*, 127.

## SMITH TAX LAW—

The amendment of Section 5649-2, General Code (103 O. L., 552), merely eliminates parts of the original section, and the words "heretofore" and "hereafter" refer to June 2, 1911. See *State, ex rel. Durr, v. Spiegel*, 13.

## SPECIAL VERDICTS—

It is error for court to explain legal effect of answer to special finding of fact, under Section 11463, General Code, or instruct jury as to harmonizing special and general verdicts, when. See *Walsh v. Thomas' Sons*, 210.

## SPECIFIC PERFORMANCE—

Presentation of claim against estate bars specific performance of agreement to convey real estate, when. See *Mignery v. Olmstead*, 416.

## STATE LANDS—

Entry and occupation of land by the state—Act of February 4, 1825 (23 O. L., 56)—In construction of canals, was an appropriation and entitled owners to compensation, when—Fee-

## State Lands—Statutes.

## STATE LANDS—Continued.

simple title in state, when—No adverse possession against state, when—Act of congress of May 24, 1828 (4 Stats. at Large, 306), operated as a present grant to state—Selection and use of lands vested fee-simple title in state as against federal government, when. See *Haynes v. Jones*, 197.

## STATE TREASURER—

Criminal law—Embezzlement—Public moneys loaned to bank—Aider and abettor—Knowledge—Sections 12873, 12874 and 13674, General Code. See *State v. Cameron et al.*, 50.

## STATUTES—

Public utility rates—Section 614-44, General Code—Franchise for furnishing water supply—Section 3982, General Code—Referendum—Section 4227-2, General Code. See *State, ex rel., v. Burris, Treas.*, 70.

Public utilities commission, acting under Section 614-51, General Code, may relieve street railway company from municipal ordinance directing extension of lines, and its order will not be reversed by supreme court, when. See *Cincinnati v. Commission*, 331.

Sections 844 to 871, General Code, providing for inspection of oils, contravene clause 2, Section 10, Article 1, U. S. Constitution, relating to interstate commerce. See *Castle v. Mason*, 296.

Workmen's compensation—Filing first notice and preliminary application bars action against employer, when—Sections 1464-61 and 1465-44, General Code. See *Zilch v. Bomgardner*, 205.

Sections 1465-62 to 1465-67, General Code (103 O. L., 72), relating to workmen's compensation for state, county, city and township employes, are constitutional. See *Porter et al. v. Hopkins*, 74.

The act of February 4, 1913 (103 O. L., 10), amending Section 1500, General Code, by providing for appointment of clerk of supreme court, is constitutional. See *State, ex rel. McKean, v. Graves*, 23.

Section 2166, General Code (103 O. L., 29)—Indeterminate sentence erroneous but not void, when—Burglary—Section 12438, General Code—Sentence of convicts—Section 12374, General Code. See *In re Winslow*, 328.

Under Section 2416, General Code, county commissioners may compound or release claim for damages against road contractor for breach of contract, when—*Pro tanto* pay may be

## Statutes.

## STATUTES—Continued.

- allowed, when—Rescission of contract of settlement. See *State, ex rel. Jewett, v. Sayre*, 85.
- Sureties offered by bank making proposal for county funds, under Section 2717, General Code, are sufficient, when. See *Commissioners v. State, ex rel.*, 145.
- Sections 3497, 3498 and 3499, General Code, regulating method of transition of municipal corporations from one class to another, are not inconsistent with Section 1, Article 18, Constitution (1912)—Federal census controls, when. See *Murray v. State, ex rel. Nestor*, 220.
- Where question of issuing municipal bonds is submitted, under Section 3939 *et seq.*, General Code, in determining two-thirds vote, under Section 3947, General Code, blank and unintelligible ballots not counted—Where majority or proportionate vote is necessary to determine result, blank and unintelligible ballots considered, when. See *Wellsville v. Connor*, 28.
- Municipal corporations—Ordinance granting franchise for furnishing water supply—Sections 3982, General Code—Public utility rates—Section 614-44, General Code—Referendum—Section 4227-2, General Code—Municipality liable, when. See *State, ex rel., v. Burris, Treas.*, 70.
- Publication of municipal ordinance in one newspaper is a compliance with Section 4227 *et seq.*, General Code, when. See *Elmwood Place v. Schanzle*, 354.
- Franchises—Referendum—Section 4227-2, General Code—Public utility rates—Section 614-44, General Code—Municipal water supply—Section 3982, General Code. See *State, ex rel., v. Burris, Treas.*, 70.
- Election not invalidated because polls kept open after hours prescribed by Section 5056, General Code (103 O. L., 21). See *In re Chagrin Falls*, 308.
- Mandamus does not lie to compel secretary of state to recount or direct recount of ballots cast on constitutional amendments and preserved under Section 5090-1, General Code (103 O. L., 265). See *State, ex rel., v. Graves, etc.*, 113.
- The amendment of Section 5649-2, General Code (103 O. L., 552), relating to limitation of tax rate, merely eliminates parts of the original section, and the words "heretofore" and "hereafter" refer to June 2, 1911. See *State, ex rel. Durr, v. Spiegel*, 13.
- Amended Section 5649-3b, General Code (103 O. L., 552, and 104 O. L., 237), designating who shall constitute county budget

## Statutes.

## STATUTES—Continued.

- commission, is unconstitutional and void—County official duties must be performed by county officials—Where an act providing substitute and repealing an existing law is declared unconstitutional, the repealing clause is invalid. See *State, ex rel. Pogue, v. Groom*, 1.
- In an action on account by a member of unlawful combination, under Section 6391, General Code, a defendant injured in his business may set up damages allowed by Section 6397, General Code, as counterclaim or set-off. See *Guyton v. Eastern Elec. Co.*, 106.
- The sales-by-weight-or-measure law (Section 6418-1, General Code; 103 O. L., 136) violates Section 1, Article 1, Constitution, and is invalid. See *In re Steube*, 135.
- Section 6828-6, General Code (104 O. L., 16), authorizing appeal from refusal of common pleas court to establish conservancy district, repugnant to Section 6, Article 4, Constitution (1912)—Section 6828-79, General Code (104 O. L., 64), giving reasons for declaring act an emergency measure, valid. See *Snyder v. Deeds*, 407.
- A partnership operating under fictitious name may commence action under Section 8104, General Code, without alleging compliance with registration act, but noncompliance is a defense and will defeat action unless compliance under Section 8099, General Code, when. See *Walsh v. Thomas' Sons*, 210.
- Order by contractor to material man not an unconditional order or acceptance, under Section 8231, General Code, when. See *Rigby v. Palmer Co.*, 371.
- Property is nonancestral, descends under Section 8574, General Code, and whole-blood heirs preferred, when. See *Schroth, Admr., v. Noble*, 438.
- Instruction to jury as to returning verdict by three-fourths of members, under Section 11455, General Code (103 O. L., 11), erroneous, but not prejudicial if verdict unanimous, when. See *Railway Co. v. Helber*, 246.
- It is error for court to explain legal effect of answer to special finding of fact, under Section 11463, General Code, or instruct jury as to harmonizing special and general verdicts, when. See *Walsh v. Thomas' Sons*, 210.
- Lessor and lessee—Rights and liabilities of lessee and his assignee for rents—Section 12206, General Code—Sureties—Oil lease—Liability of assignee for royalties. See *Gas Co. v. Oil Co.*, 35.



## Statutes—Statutory Construction.

## STATUTES—Continued.

Criminal law—Conviction for burglary—Indeterminate sentence to penitentiary—Claim of illegal detention—Application for *habeas corpus*—Sentence erroneous but not void, when—Sections 2166, 12374, 12438 and 13767, General Code. See *In re Winslow*, 328.

Criminal law—Joint indictment—Nollied against one defendant—Discharge claimed by remaining defendant—Offense joint and several—Sections 12472, 12473 and 12474, General Code—Embezzling or misapplying bank funds—Section 44, Thomas banking act. See *State v. Keith*, 132.

Officers of bank organized under free-banking act (49 O. L., 41) may be guilty of embezzlement under Section 12474, General Code, when. See *State v. Barkman*, 248.

Amended Section 12672, General Code, providing penitentiary sentence upon second conviction for illegal sale of cocaine, is not *ex post facto* or retroactive, when—*Habeas corpus*—Constitutionality of indeterminate-sentence law. See *In re Allen*, 315.

Criminal law—Embezzlement—Public moneys loaned to bank—Aider and abettor—Knowledge—Sections 12873, 12874 and 13674, General Code. See *State v. Cameron et al.*, 50.

Bill of exceptions by prosecuting attorney or attorney general in criminal case, under Section 13681, General Code, must be filed within forty days after rendition of judgment, when. See *State v. Cox*, 141.

Section 15150-4, General Code (103 O. L., 112), authorizing levy for interest and sinking funds to redeem Cincinnati Southern Railway terminal facility and betterment bonds (102 O. L., 111), conforms to Section 11, Article 12, Constitution. See *Cincinnati v. Harris*, 151.

## STATUTORY CONSTRUCTION—

Where an act providing substitute and repealing an existing law is declared unconstitutional, the repealing clause is invalid, when. See *State, ex rel. Pogue, v. Groom*, 1.

Where an amendatory act contains entire section as amended and repeals the original statute (Section 16, Article 2, Constitution), the amended section is construed, how—Amended sections considered with entire subject, when—Section 5649-2, General Code, as amended 103 O. L., 552. See *State, ex rel. Durr, v. Spiegel*, 13.

## Statutory Construction—Supervisors of Elections.

## STATUTORY CONSTRUCTION—Continued.

Where an amendatory act contains provisions of original section and original section is repealed (Section 16, Article 2, Constitution) such provisions are regarded as continuous and undisturbed, when. See *In re Allen*, 315.

## STOCK CERTIFICATES—

Rights of purchasers of certificates of stock given as collateral and sold by bank upon default, as against attachment and garnishment. See *Bergin v. McCabe*, 427.

## STOCKHOLDERS—

Receivership—Creditors' committee—Assignment of claims by creditors—Interagreement by two stockholders—Stockholders' liability—Purchase of claims by one stockholder—Accounting in action to enforce liability—Remedies. See *Jones v. Turney & Jones Co.*, 122.

## STOCK SUBSCRIPTION—

Errors in admission and rejection of evidence in action for fraud in securing stock subscription. See *Champney v. Braun*, 388.

## STREET RAILWAYS—

Public utilities commission, acting under Section 614-51, General Code, may relieve street railway company from municipal ordinance directing extension of lines, and its order will not be reversed by supreme court, when. See *Cincinnati v. Commission*, 331.

Whether one who had alighted from car and was assaulted by employe was a passenger, jury question, when. See *Gill v. Ry. & Lt. Co.*, 435.

## SUBSCRIPTION TO STOCK—

Errors in admission and rejection of evidence in action for fraud in securing stock subscription. See *Champney v. Braun*, 388.

## SUPERVISORS OF ELECTIONS—

Objections to nomination of candidates will not be ordered heard and determined unless filed within proper time, when. See *State, ex rel. Scott, v. Swan*, 61.

## Supreme Court—Suretyship.

## SUPREME COURT—

In a primary election a voter affiliated with one party cannot become the candidate of another party for supreme court judge. See *State, ex rel. Murphy, v. Graves*, 36.

Constitutional law—Conflict of judgment of court of appeals with circuit court—Writ of *certiorari*—Section 6, Article 4, Constitution (1912). See *McLarren v. Johnson*, 108.

Supreme court will not reverse order of public utilities commission relieving street railway company from municipal ordinance directing extensions of lines, when. See *Cincinnati v. Commission*, 331.

Supreme court will not reverse judgment where court of appeals reversed on weight of evidence, when. See *Bevan v. Board of Foreign Missions*, 395.

Effect of failure to prepare bill of exceptions or include agreed statement of facts therein. See *Telephone Co. v. Telephone Co.*, 398.

## SUPREME COURT CLERK—

The act of February 4, 1913 (103 O. L., 10), amending Section 1500, General Code, by providing for appointment of clerk of supreme court, is constitutional. See *State, ex rel. McKean, v. Graves*, 23.

## SURETYSHIP—

Lessor and lessee—Rights and liabilities of lessee and his assignee for rents—Section 12206, General Code—Sureties—Oil lease—Liability of assignee for royalties. See *Gas Co. v. Oil Co.*, 35.

County commissioners cannot refuse to award county funds to bank offering highest interest, under Section 2717, General Code; because sureties named in proposal for inactive deposits are same as for active deposits, when. See *Commissioners v. State, ex rel.*, 145.

Bond to secure building contract not obtained by fraud or concealment nor to compound a felony, when. See *Bittner v. Title Co.*, 369.

Appeal bond signed by codefendant insufficient, when. See *Steele v. Garn*, 381.

Interest on amount of default computed, how. See *Surety Co. v. State*, 392.

## Taxation—Testimony.

## TAXATION—

Amended Section 5649-3b, General Code (103 O. L., 552, and 104 O. L., 237), designating who shall constitute county budget commission is unconstitutional and void—County official duties must be performed by county officials. See *State, ex rel. Pogue, v. Groom*, 1.

The amendment of Section 5649-2, General Code (103 O. L., 552), relating to interest and sinking fund, merely eliminates parts of the original section, and the words "heretofore" and "hereafter" refer to June 2, 1911. See *State, ex rel. Durr, v. Spiegel*, 13.

The act authorizing levy for interest and sinking funds (103 O. L., 112), to redeem Cincinnati Southern Railway terminal facility and betterment bonds (102 O. L., 111), conforms to Section 11, Article 12, Constitution. See *Cincinnati v. Harris*, 151.

Ohio oil-inspection act affecting interstate commerce contravenes clause 2, Section 10, Article 1, U. S. Constitution, and is unconstitutional because imposing fees in excess of necessary inspection expenses. See *Castle v. Mason*, 296.

County treasurer entitled to receive what per cent. of delinquent personal-tax penalties collected. See *Surety Co. v. State, ex rel.*, 421.

## TERRACE—

Erection of apartment or terrace does not violate "residence" clause in deed, when. See *Geist v. Ehrich*, 419.

## TESTATOR—

Whether gift to legatee, subsequent to date of will, is an ademption depends upon testator's intention—Gift will be presumed an ademption of legacy *pro tanto* where made to child or one *in loco parentis*, when. See *Ellard, Exr., v. Ferris, Exr.*, 339.

## TESTIMONY—

Criminal law—Murder—Evidence—Impeachment—Testimony of physicians—Rebuttal—Admission and competency of evidence—Expert witnesses—Hypothetical question—Charge to jury—Preponderance of evidence. See *Hoover v. State*, 41.

Malpractice—Physician—Expert testimony—Degree of skill required—Charge to jury. See *Hier v. Stites*, 127.

## Thomas Banking Act—Trial Practice.

## THOMAS BANKING ACT—

Criminal law—Joint indictment—Nollied against one defendant—Discharge claimed by remaining defendant—Offense joint and several—Sections 12472, 12473 and 12474, General Code—Embezzling or misapplying bank funds—Section 44, Thomas banking act. See *State v. Keith*, 132.

Banks organized under free-banking act (49 O. L., 41) continue body politic until repeal of the act—The Thomas banking act (99 O. L., 269) did not repeal the free-banking act—Embezzlement. See *State v. Barkman*, 248.

## THREE-FOURTHS VERDICT—

Instructions to jury as to returning verdict by three-fourths of members under Section 11455, General Code (103 O. L., 11), erroneous, but not prejudicial if verdict unanimous, when. See *Railway Co. v. Helber*, 246.

## TITLE—

Entry and occupation of land by the state—Act of February 4, 1824 (23 O. L., 56)—In construction of canals, was an appropriation and entitled owners to compensation, when—Fee-simple title in state, when—No adverse possession against state, when—Act of congress of May 24, 1828 (4 Stats. at Large, 306), operated as a present grant to state—Selection and use of lands vested fee-simple title in state as against federal government, when. See *Haynes v. Jones*, 197.

## TOTAL DISABILITY—

Time for recuperation included in total-disability period for accident insurance, when. See *Amer. Assur. Co. v. Dickson*, 380.

## TREASURER—

Criminal law—Embezzlement—Public moneys loaned to bank—Aider and abettor—Knowledge—Sections 12873, 12874 and 13674, General Code. See *State v. Cameron et al.*, 50.

County treasurer entitled to receive what per cent. of delinquent personal-tax penalties collected. See *Surety Co. v. State, ex rel.*, 421.

## TRIAL PRACTICE—

Criminal law—Murder—Evidence—Impeachment—Testimony of physicians—Rebuttal—Admission and competency of evidence

## Trial Practice.

## TRIAL PRACTICE—Continued.

- Expert witnesses—Hypothetical question—Charge to jury—Preponderance of evidence. See *Hoover v. State*, 41.
- Mandamus does not lie to compel judge to sign bill of exceptions taken on trial before referee, when; the record without a bill presents all questions to appellate court, when. See *State, ex rel. Klorer, v. Fimple*, 99.
- Malpractice—Physician—Expert testimony—Degree of skill required—Charge to jury. See *Hier v. Stites*, 127.
- Criminal law—Joint indictment—Nolled against on defendant—Discharge claimed by remaining defendant—Offense joint and several—Sections 12472, 12473 and 12474, General Code—Embezzling or misapplying bank funds—Section 44, Thomas banking act. See *State v. Keith*, 132.
- Bill of exceptions by prosecuting attorney or attorney general in criminal case, under Section 13681, General Code, must be filed within forty days after rendition of judgment, when. See *State v. Cox*, 141.
- Questions of agency and time of forming criminal intent in embezzlement are jury questions and it is error to direct verdict, when. See *State v. Gross*, 161.
- One indicted for embezzlement of insolvent bank funds is entitled to change of venue, when—Burden and degree of proof where evidence of other similar offenses is competent—Duty of trial court to charge jury at time evidence offered. See *Baxter v. State*, 167.
- Altercations between counsel, side remarks and comment on evidence should not be tolerated by trial judges. See *Baxter v. State*, 167.
- It is error for court to explain legal effect of answer to special finding of fact, under Section 11463, General Code, or instruct jury as to harmonizing special and general verdicts, when. See *Walsh v. Thomas' Sons*, 210.
- Duty of court where counsel in argument to jury comment on special findings of fact. See *Walsh v. Thomas' Sons*, 210.
- Jury entitled to pleadings during deliberations—Pleadings admissible in evidence to prove admissions or impeach statements, when. See *Railway Co. v. Helber*, 231.
- Instruction to jury as to returning verdict by three-fourths of members, under Section 11455, General Code (103 O. L., 11), erroneous, but not prejudicial if verdict unanimous, when. See *Railway Co. v. Helber*, 246.

**Trial Practice—Unlawful Combinations.****TRIAL PRACTICE—Continued.**

Judgment of court refusing to amend return of service of summons is final and evidence cannot be introduced on that issue, when. See *Paulin v. Sparrow*, 279.

Errors in admission and rejection of evidence in action for fraud in securing stock subscription. See *Champney v. Braun*, 388.

Error to omit to charge jury that contributory negligence defeats recovery, when. See *Klein v. Goldstein*, 388.

Supreme court will not reverse judgment where court of appeals reversed on weight of evidence, when. See *Bevan v. Board of Foreign Missions*, 395.

Effect of failure to prepare bill of exceptions or include agreed statement of facts therein. See *Telephone Co. v. Telephone Co.*, 398.

Error to charge jury to consider only evidence that appeals to sense of justice and fairness, when. See *Fox v. Jewell*, 409.

Error to charge jury as to measure of damages where same fixed by terms of contract, when. See *Crites v. Pillmore-Anderegg Co.*, 412.

**TWO-THIRDS VOTE—**

Where question of issuing municipal bonds is submitted, under Section 3939 *et seq.*, General Code, in determining two-thirds vote, under Section 3947, General Code, blank and unintelligible ballots not counted—Where voter expresses no choice, his ballot is not to be counted; where majority or proportionate vote is necessary to determine result, blank and unintelligible ballots considered, when. See *Wellsville v. Connor*, 28.

**UNLAWFUL COMBINATIONS—**

Action under Section 6391, General Code—Counterclaim or set-off by defendant—Under Section 6397, General Code—*Valentine anti-trust law*—In an action on an account by a member of an unlawful combination under Section 6391, General Code, for goods sold the price of which is advanced as a result of the unlawful combination, a defendant injured in his business by reason of the advance in price of the goods purchased by him from such member, may set up by way of counterclaim or set-off the damages allowed by Section 6397, General Code. *Guyton v. Eastern Elec. Co.*, 106.

## Utilities Commission—Vendor and Vendee.

## UTILITIES COMMISSION—

1. *Powers and duties—Municipal ordinance directing extension of street railway lines—Section 614-51, General Code—Commission may relieve company of ordinance obligations, when—*  
The requirements of a city ordinance, directing a street railway company to construct extensions of its lines, are subject to review by the public utilities commission, which is authorized, upon hearing, to determine whether the requirements of such ordinance are just and reasonable. *Cincinnati v. Commission*, 331.
2. *Supreme court will not reverse order of commission, when—*  
Under the provisions of Section 614-51, General Code, the public utilities commission may determine the practicability of additions and extensions of street railway lines required by a city ordinance. In reaching such determination the commission may consider the physical conditions of the proposed route as well as the necessary plan of operation of cars thereover. If upon such hearing the commission finds that operation of cars over the proposed route would entail unusual and unwarranted dangers and jeopardize the lives of passengers, it is authorized to relieve the street railway company from the obligations sought to be imposed by the ordinance complained of. Such order of the commission will not be reversed upon review by this court when it does not appear from a consideration of the record that it is unlawful or unreasonable. *Ib.*

## VALENTINE LAW—

In an action on account by a member of unlawful combination, under Section 6391, General Code, a defendant injured in his business may set up damages allowed by Section 6397, General Code, as counterclaim or set-off. See *Guyton v. Eastern Elec. Co.*, 106.

## VARIANCE—

Criminal law—Rape—Variance between indictment and proof—  
Different transactions—Election by state—Date of offense—  
Evidence of act—Intercourse with others—Venereal disease—  
Physical examination of accused, See *Angeloff v. State*, 361.

## VENDOR AND VENDEE—

Facts necessary to justify recovery in action for false representations in sale of wife's real estate by husband; averment of



## Vendor and Vendee—Waterworks.

## VENDOR AND VENDEE—Continued.

knowledge of false representations unnecessary, when—Wife bound by husband's representations and acts, when. See *Gleason v. Bell*, 268.

Action to recover purchase price of realty, held in escrow, prematurely brought, when. See *Straus v. Stern*, 401.

Erection of apartment or terrace does not violate "residence" clause in deed, when. See *Geist v. Ehrich*, 419.

## VENEREAL DISEASE—

Criminal law—Rape—Variance between indictment and proof—Different transactions—Election by state—Date of offense—Evidence of act—Intercourse with others—Venereal disease—Physical examination of accused. See *Angeloff v. State*, 361.

## VENUE—

One indicted for embezzlement of insolvent bank funds is entitled to change of venue, when. See *Baxter v. State*, 167.

## VERDICT—

Questions of agency and time of forming criminal intent in embezzlement are jury questions and it is error to direct verdict, when. See *State v. Gross*, 161.

It is error for court to explain legal effect of answer to special finding of fact, under Section 11463, General Code, or instruct jury as to harmonizing special and general verdicts, when. See *Walsh v. Thomas' Sons*, 210.

Apportionment of cost of grade-crossing elimination as fixed by ordinance and verdict of jury. See *Traction Co. v. Akron*, 382.

## VOTES—

Election not invalidated because polls kept open after statutory closing time, in absence of fraud and illegal votes, when. See *In re Chagrin Falls*, 308.

## WATERWORKS—

Municipal corporations—Ordinance granting franchise for furnishing water supply—Section 3982, General Code—Public utility rates—Section 614-44, General Code—Referendum—Section 4227-2, General Code—Municipality liable, when. See *State, ex rel., v. Burris, Treas.*, 70.

## Weight of Evidence—Written Contracts.

## WEIGHT OF EVIDENCE—

Supreme court will not reverse judgment where court of appeals reversed on weight of evidence, when. See *Bevan v. Board of Foreign Missions*, 395.

## WEIGHTS AND MEASURES—

The sales-by-weight-or-measure law (Section 0418-1, General Code; 103 O. L., 136) violates Section 1, Article 1, Constitution, and is invalid. See *In re Steube*, 135.

## WILLS—

Whether gift to legatee, subsequent to date of will, is an ademption depends upon testator's intention—Gift will be presumed an ademption of legacy *pro tanto* where made to child or one *in loco parentis*, when. See *Ellard, Exr., v. Ferris, Exr.*, 339.

## WORDS AND PHRASES—

"Advancement" and "ademption" defined and distinguished. See *Ellard, Exr., v. Ferris, Exr.*, 348.

## WORKMEN'S COMPENSATION—

*Constitutional law*—Sections 1465-62 to 1465-67, General Code (103 O. L., 72)—*State, county, city and township employes*—The provisions of Sections 15 to 20 of the act passed February 26, 1913, known as the workmen's compensation law (103 O. L., 72), constitute a valid exercise of the legislative power not repugnant to the constitution or to any limitation contained therein. *Porter et al. v. Hopkins*, 74.

Workmen's compensation—Filing first notice and preliminary application bars action against employer, when—Sections 1465-61 and 1465-44, General Code. See *Zilch v. Bomgardner*, 205.

## WRITS—

Constitutional law—Conflict of judgment of court of appeals with circuit court—Writ of *certiorari*—Section 6, Article 4, Constitution (1912). See *McLarren v. Johnson*, 103.

## WRITTEN CONTRACTS—

A contract to pay for services rendered by member of family may be written or parol and proven by direct or indirect evidence; degree of proof to establish contract. See *Merrick v. Ditsler*, 256.

*Ex. C. M.*  
12/29/15















